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ONTARIO LABOUR RELATIONS BOARD REPORTS

January 1991



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1991] OLRB REP. JANUARY

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
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Unfair Labour Practice - Duty of Fair Representation - Complaint based on union's late referral to arbitration of employee's grievance under s.45 of the *Act* and subsequent referral to three-person board of arbitration - Board finding that late referral not a breach of the *Act* and that subsequent conduct of union reasonable in the circumstances - Complainant also alleging that union's failure to keep her adequately informed led her to reject company's settlement offer - Board finding that union kept complainant fully apprised and that complainant acted against advice of union and its lawyer - Complaint dismissed

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Unfair Labour Practice - Duty of Fair Representation - Whether complaint stating *prima facie* case - Board declining to hear complaint against company as fair representation duty imposed solely on trade union - Board declining to hear complaint against union insofar as alleged violation based on failure to represent employee in criminal proceedings - Board declining to dismiss complaint concerning union's handling of grievance and its agreement to admit criminal trial transcript as evidence at arbitration hearing

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Unfair Labour Practice - Duty to Bargain in Good Faith - *Hospital Labour Disputes Arbitration Act* - Interest Arbitration - Employer tabling new proposal after lengthy negotiations and "no board" report issued - Proposal aimed at reversing effect of rights arbitration award issued only days before - Interest arbitrator pursuant to *Hospital Labour Disputes Arbitration Act* not yet appointed - Whether bad faith bargaining - Board declining to find prior to conclusion of bargaining process that parties "locked in" to proposals - Complaint dismissed

TIMMINS-GOLDEN MANOR HOME FOR THE AGED, THE CORPORATION OF THE CITY OF; RE C.U.P.E. AND ITS LOCAL UNION 1140, C.L.C. 103

Unfair Labour Practice - Interference in Trade Unions - Remedies - Position eliminated and

X

grievor laid off following attendance at certification hearing - Member of management continuing to do all work grievor had previously done - Board satisfied that employer motivated, at least in part, by grievor participating in Board proceeding and his exercise of lawful rights under the Act - Remedies including reinstatement with full compensation, posting and cease and desist order

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0561-90-R Peter Sourtzis, Applicant v. United Steelworkers of America, Respondent v. Allan Windows, Intervener

Petition - Termination - Whether petition an expression of the voluntary wishes of those who signed - Board hearing contradictory evidence concerning sequence of creation of petition - Petitioner a cousin of the plant foreman and Board finding that petitioner, although in the bargaining unit, having some control over economic lives of fellow employees - Application dismissed

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *J. A. Rundle* and *H. Peacock*.

APPEARANCES: *Peter Sourtzis* for the applicant; *Michael Gottheil*, *Jonathan Eaton* and *Brando Paris* for the respondent; *Lynda A. Coulter* for the intervener.

DECISION OF THE BOARD; January 7, 1991

1. The name of the respondent is amended to read: "United Steelworkers of America".

2. This is an application for termination of the union's bargaining rights under section 57 of the *Labour Relations Act*. Subsequent to the filing of the petition in support of this application, a certain number of statements of reaffirmation of support for the union were filed. After a review of the list and the count with the Board's Officer, the parties agreed that the reaffirmations were not relevant as they would not bring the number of employees in support of the termination application below 45 percent. The Board therefore inquired into the voluntariness of the petition and not of the reaffirmations.

3. The applicant, Peter Sourtzis, is a leadhand in the glazing department. Several employees from his department approached him in the period before the expiry of the collective agreement on April 15, 1990 as to what steps could be taken to terminate the bargaining rights of the union. Informal discussion continued in the plant as to the pros and cons of unionization. Seventeen or eighteen employees then had a meeting on May 14, after which he was approached again. He arranged for the drafting of and was the circulator of the petition. He formerly held the position of sub-steward for a union at another workplace and was thus of the opinion that other employees considered him to have some expertise in matters relating to the union and that this was why people had approached him, as well as because his English is better than many of those in his department. Mr. Sourtzis saw this as people giving him a job to do. He gave the impression throughout his testimony that he would not have started the petition if people had not come to him and asked him to do it. Ms. Hyatt, a bargaining unit employee with whom he discussed the idea, indicated she would have done it if she had not been sick at the time.

4. The exact dates of the drafting and signing of the petition are uncertain. Mr. Sourtzis originally testified that he was sure that the document was created on May 20, 1990, but other evidence later convinced him he must be mistaken. Ms. Hyatt testified that, although she had not witnessed the drafting, she knew that her daughter had written the heading on May 13, the date on which Peter Sourtzis had spoken to her to say "we want to get the union out". However, Mr. Sourtzis indicated he had prepared the petition with the help of Ms. Hyatt's daughter after the employees' meeting, which the two witnesses who had attended put at May 14, 1990.

5. Mr. Sourtzis witnessed every signature on the petition. He testified that he told people to read the petition before they signed. Tileta Hyatt's daughter wrote the following words at the top of the petition, apparently on May 13th, at her home:

We the workers of Allan Windows would not like to have the United Steel Workers of America representing us.

If people indicated they did not understand these words he took a Vietnamese or Indian person with him to interpret. He did not explain to people what the words meant before they signed. He said people already knew what they meant because they had asked him after they had decided that they were against the union. Word passed among the employees in the group who had asked Mr. Sourtzis to assist them with decertifying the union. Most of the signatures were obtained at homes of employees but some were done at a donut shop close to the plant. None of the signatures were gained on company property and Mr. Sourtzis did not bring the petition to work. He did not speak to anyone in management about it and never gave the petition to anyone else.

6. Mr. Sourtzis did not know all the signatories by name but knew their faces and was able to testify in some detail as to the circumstances of most of the signatures. He phoned some people before he went to their houses, some people invited him to their house after four o'clock and he arrived unannounced to others. He had phone numbers for some, but not all, of the employees from social occasions and because his brother, another leadhand, had phone numbers of some fellow countrymen. Another leadhand, Danesh Deoram drove him around from place to place, usually waiting in the car for Mr. Sourtzis to finish. On one night Mr. Sourtzis collected ten signatures by going around from apartment to apartment in the area where many of the employees lived close together. When all the signatures were obtained, Mr. Sourtzis made photocopies and mailed it by registered mail on May 24th.

7. Mr. Sourtzis' memory was not clear on details particularly as to timing. For instance, he said in his direct evidence that he took the day off to mail the petition to the Board but later on he testified that he went home to get it and mailed it at lunch hour and returned to work late. He said he and Mr. Deoram asked for and received permission to do so saying it was personal business. At a later point he took a half day off to deliver a copy of the collective agreement to the Board. He changed his evidence as to when the last signature was obtained as a result of his confusion over the circumstances in which the petition was mailed to the Board.

8. There are dates next to signatures on the petition ranging from May 15 to May 24, 1990. When they signed their names some people did not put a date on the petition. Various other people filled in some of the dates. The evidence was confusing as to who inserted what dates and it is doubtful that they are all reliable indications of what date the corresponding signature was placed on the document. Mr. Sourtzis originally said that one co-worker put the dates in but in later evidence indicated that a second co-worker also put some dates in. Ms. Hyatt testified that her daughter, who printed the wording at the top of the petition, also put in a number of the dates on May 20 when Tileta Hyatt signed, from Mr. Sourtzis' memory of when they had signed.

9. Mr. Sourtzis' duties as leadhand, which is a bargaining unit position, became the subject of much evidence and argument. It attracts forty cents per hour as a premium. He works in a department with fifteen people and said that he had no special duties, that he worked like the rest of the people in his department. He said he referred things like discipline to his cousin Steve Sourtzis for action. Ms. Wilkins, the Office Manager corroborated this view and expressed her opinion that he had no control over the economic lives of other employees. However, the evidence in its totality satisfies us that he is in charge of the flow of the work and for correcting peoples' mistakes. His complaints about employee conduct have resulted in discipline from Steve Sourtzis, the plant foreman. In one discipline notation he was referred to as a foreman, although the company describes this as a typographical error and noted that disciplinary notices are not posted in the plant. He has no authority to hire or fire. He is responsible for a daily production record to be

given to the foreman. People speak to him or the plant foreman before leaving early. One of the people who went to him for assistance with the petition referred to him as the person who is in charge of the department.

10. On April 18, 1990, less than a month before the petition was circulated, a document was published by the company, listing the foreman and leadhands in the plant without labelling which person was a foreman rather than a leadhand. The union made an issue of the fact that employees could have been confused as to who were the foremen and who were the leadhands. The evidence as a whole indicated that the differences between the working foreman and the leadhands was not indeed very great. For instance, the foreman has to approach the plant foreman on disciplinary matters as do the leadhands. The office manager knows who are the foremen and who are leadhands only by whether or not union dues are deducted from their pay. From this, employer counsel argued that the foreman did not have very prominent managerial duties either and therefore nothing should flow from any confusion between foremen and leadhands. As well, each individual would have been clear on who his or her own leadhand was.

11. A union witness, who had signed the petition, thought that the difference between a foreman and a leadhand was that a foreman could get you fired and the leadhand could not. He says he thought Sourtzis was a foreman because of the way he ran the department. The view that Mr. Sourtzis' style marked him as a foreman in employees' eyes was shared by the other two union witnesses, Mero and Merchan, but not by the applicant's witness Hyatt. The union's witnesses characterized Mr. Sourtzis as wielding more authority in departments other than his own than other leadhands, and having more direct access to Steve Sourtzis, the plant Manager, than other leadhands, bypassing the foreman, Manuel Avila. Ms. Hyatt, on the other hand, said that Peter Sourtzis simply urged people to hurry when production was needed, much like others, as part of the general cooperation that is common when it is necessary to get work out quickly. She was of the view that people became foremen after being leadhands for a certain length of time.

12. Another issue raised by the union to cast doubt on the voluntariness of the petition is the familial relationship between Peter Sourtzis and management. The plant foreman, who manages the entire plant, is Steve Sourtzis, the applicant's cousin. A third Mr. Sourtzis, Peter's brother, is another lead hand. The union presented evidence from one signator of the petition that he assumed that management would know whether he signed or not because Peter and Steve are family. Ms. Wilkins, the office manager, said that if the relationship has any effect it is that Steve is harder on Peter than other people because he is family whereas the union's Plant Chairman said that Peter's special relationship with Steve is evident in the plant because Steve "protects Peter in everything he does."

13. The signator who testified for the union said that when Mr. Sourtzis, whom he thought was a foreman, asked him to sign, there was nothing on the petition to read and that Mr. Sourtzis just said to sign it. This witness had heard someone whom he declined to name saying that without a union there would be lay-offs and that those who signed the petition would be kept and so he says he signed to protect his job. He said that the signatures in the signature column above his name on the document were not on the petition when he signed. Mr. Sourtzis maintains that he told him not to sign without reading and that this signator was in a big rush to sign and he just signed. The signator said in response that, seeing that Mr. Sourtzis had the majority of the other employees' names, he signed too. He also testified that he thought the fact that he signed would get back to management because Steve and Peter are family.

14. Evidence indicated that a notice dated May 16, 1990 was posted in the plant naming 18

people out of the 61 member bargaining unit who would report to work on May 22th, as part of a partial lay-off between May 18 and 28, 1990.

Argument

15. Mr. Sourtzis emphasized that he had obtained all the signatures off company premises and that he had left people free to sign or not as they wished. He did not agree that people saw him as a foreman, and urged the Board to order a vote.

16. Management counsel argued that on all the evidence we should not conclude that Peter Sourtzis was perceived to be a foreman. She said that the responsibilities of Manager in the plant are with the plant foreman who works closely with the Plant Manager and the owner and not with either the foreman or the leadhands. She said that the union witnesses who saw Mr. Sourtzis as a foreman lack credibility. She emphasized that the only reason that Ms. Hyatt had not done the petition was that she was sick and otherwise Mr. Sourtzis would have had nothing to do with it. She said that the union's case rests on a relationship between Steve and Peter Sourtzis who are only cousins. Steve's job is over sixty-six people and Peter's is over ten. He does not discipline, he does not authorize vacation or grant overtime. He merely directs the work while working alongside of the other people in the department.

17. Union counsel argued that it was important to emphasize that the task of the Board is not to decide whether the employees are dissatisfied but to decide whether or not the petition was voluntary. The union suggested that Sourtzis was a completely unreliable witness because of his difficulty remembering places and times. He said that the Board must decide whether this was a reliable document and submitted that the evidence surrounding it indicates that it is not. The union points to the uncertainties in the evidence as to when the wording was put on the petition and when the dates were filled in. The union bases its case on the inconsistencies in the evidence and the perception of the employees that Peter Sourtzis was either a foreman or so close to management as to warrant the inference that employees would think that whether or not they signed would come to management's attention.

Decision

18. The Act requires us to determine whether 45 percent of the employees in the bargaining unit voluntarily signed the petition circulated by Mr. Sourtzis. The Board has clearly indicated in the past that this means that the onus is on the applicant to satisfy the Board that the employees who signed did not do so out of fear that their managers would learn whether they signed or not, or out of a wish to identify themselves with something they view as sanctioned by management, whether tacitly or not. The process of deciding whether it is so satisfied involves a consideration of the evidence of all the surrounding circumstances to determine what the reasonable or average employee, neither the overly intrepid, nor the overly timid, might have concluded as to the petition. In this regard, the Board has held that it is not necessary or desirable to hear from a series of individual signators as to what did or did not influence them, as this is subjective evidence. In some cases, it has specifically excluded such evidence particularly if the source of the employee concerns is unidentified. See the discussion of the problems with such evidence in *Zest Furniture Industries Limited*, [1987] OLRB Rep. Feb. 299.

19. There are factors that would indicate that we should accept the petition as an expression of the voluntary wishes of those who signed. Firstly, it seems to have arisen freely from a group of employees who were discontent with the union feeling that the benefits of being unionized did not warrant the level of dues. The evidence indicates that Mr. Sourtzis did not get up the petition on the behest of his superiors, but of people in his department who had less facility with the English

language and less familiarity with union matters than he. He does not appear to have used his position as a lead hand or as a cousin of the plant manager to “sell” the petition, but relied on the individuals to read the heading and sign or not as they wished. Signatures were not gained on employer premises. Not all employees saw him as a foreman, and even if they did, his position is a bargaining unit position and he should not lightly be deprived of the right under the Act to bring an application to terminate the union’s bargaining rights. See, among others, *Tip Top Tailors* [1981] OLRB Rep. April 492 and *Irwin Toy Limited*, [1983] OLRB Rep. April 536.

20. We would also note that the evidence of the signator that he signed out of fear for his job was subject to internal inconsistencies, and it is difficult to assign it much weight, particularly in light of the problems of deciding these matters on the basis of individual perception referred to above. Individuals have varying reactions to the same stimuli. Without knowing the source of the statements which this signator said he was reacting to it is impossible to evaluate whether the average reasonable employee would have ascribed importance to them. This is particularly so when the threat to his job was allegedly lay-offs that would come when the union was out at a time when the employees were already in the middle of a lay-off. As well, although the witness said he signed out of fear for his job, when challenged on that by Mr. Sourtzis, he said he signed because most of the other employees had signed. While both could theoretically be true, the latter detracts from the former. As well, he testified that there were not signatures on the sheet when he signed. It is clear that his was the last signature. Three witnesses other than Mr. Sourtzis testified that there were numbers of signatures on the document before he signed, and the physical placement of his signature on the page is such that it appears to follow in a line from the others. Thus, at least this part of his evidence does not appear to be correct.

21. There are also factors tending to the opposite conclusion - that people did not sign voluntarily. Firstly, although there is no evidence of direct managerial involvement in the origination and circulation of the petition, Peter Sourtzis is a leadhand, and a relative of management. Where the Board has determined that the circulator of a petition would be reasonably perceived as closely associated with management and that a reasonable employee would be concerned that management would come to know whether they signed the petition or not, it has not relied on the petition as a voluntary expression of employee wishes. See, among others, *Johnson Matthey Limited*, [1987] OLRB Rep. April 518.

22. Peter Sourtzis’ recommendation had resulted in discipline of other employees, on the notation of one of which he was described as a foreman. Some employees undoubtedly perceived him as closely aligned with management, whether because of his power of effective recommendation for discipline, family relationship with the Plant Manager, and/or confusion as to whether he was a foreman or not. It is a reasonable inference that employees who perceived him in this manner would see him as likely to disclose to management whether or not he or she signed.

23. Although Mr. Sourtzis may have been approached about the petition because of his previous union experience, he was the leadhand of those who approached him and it is equally plausible that his supervisory position, however circumscribed, was part of the reason these people turned to him. Much of Mr. Sourtzis’ evidence was aimed at stressing that his actions were in response to the meeting of the employees which he did not attend. In this regard, it is troubling that the employees who attended the meeting were quite clear that it took place on May 14, while Ms. Hyatt’s evidence was that the petition was drafted before that, on May 13th when Mr. Sourtzis came to see her about decertifying the union. The only other date in evidence as to the drafting of the petition was Mr. Sourtzis’ original testimony to the effect that it was drafted on May 20th, but he later believed this to be in error, and all the other circumstances suggest that the the date of drafting was earlier than that. This leaves the only evidence as to when it was drafted as May 13,

which is in conflict with the sequence that Mr. Sourtzis stressed in his evidence. The importance of this conflict is somewhat reduced by the fact that employees had spoken with him before then as well, but it remains a concern.

24. In assessing the weight to be given to the various competing considerations in this case we agree with the following excerpt from *Ontario Hospital Association* [1980] OLRB Rep Dec. 1759 at paragraph 32:

... having regard to the simple history of this matter, and the demeanour and evidence of the various sponsors of the petition as to their reasons for embarking on the course of conduct that they did, the Board is satisfied that these individuals acted on the basis of their own initiative and personal choice. The origination of the petition, in other words, is not a matter that troubles the Board in the present case. That, however, is not an end to the matter. While the signatures on the documents before the Board represent in excess of the 45 percent required under section 49(3) of the Act before the Board can direct the taking of a representation vote, the Board must still ascertain whether the signature of not just the petition's sponsors but of a full 45 per cent of the unit, are a voluntary reflection of those employees' wishes. It must be remembered that the Board has the benefit of the direct evidence of only the sponsors of the petition who appear to testify; the remainder of the employees' wishes can be ascertained only through the evidence that they signed the petition, together with the inferences that the Board is able to draw from the circumstances under which they signed. As far as these other employees are concerned, their action in signing the petition presented to them represents no more than what the Board has described as their "ostensible" wishes, and the Board still has upon it the statutory obligation to ascertain from all of the surrounding evidence whether their actions in signing can be taken to have been voluntary. While background factors may, once again, be properly taken into account in weighing this issue of voluntariness, particularly where the evidence on circulation is at all equivocal, the Board is not entitled to simply assume from this alone that any employees who have signed have done so voluntarily. To do so would render meaningless the insertion of the "voluntarily" in the subsection, together with the inquiry which the Board has always considered it necessary to undertake in these cases.

25. In light of the Board's jurisprudence on the question of voluntariness, the issue is whether the Board has reasonable assurance that a full 45% of the signatories signed without a concern that whether or not they signed would come to the attention of management and/or out of a wish to identify themselves with something that the employer favored them doing. Because of the strength of the competing considerations outlined above, this case is close to the line. In circumstances such as these, the onus of proof becomes an important consideration. The onus is squarely on the applicant to convince the Board, on a balance of probabilities, that the circumstances in which a full 45% of the signatories of the petition signed are free of the concerns outlined above. In this case, the combination of the problems in the evidence about the sequence of creation of the document, together with the dual reasons why a signatory might perceive Peter Sourtzis as closely aligned with management - both a family relationship and his leadhand responsibilities, particularly in respect to his power of effective recommendation for discipline - is of significant concern, whereas any one of them in isolation might be overcome. Although Peter Sourtzis does not have the power to fire directly, a series of adverse recommendations from him could well have the same result. In this regard, the evidence convinces us that he does have some control over the economic lives of his fellow employees. We find ourselves unconvinced that employees would more likely than not have signed free of a concern that whether or not they signed would become known to management, much as daily production and problems with their performance came to be known to management through the agency of Mr. Sourtzis.

26. In the result the application is dismissed.

1872-90-FA Teamsters Local Union 419, Applicant v. Arrow Games Inc., Respondent

First Contract Arbitration - Interest Arbitration - Wages and retroactivity in dispute - Board discussing importance of parties filing background information, statistics and other data in support of assertions made to the Board - Board making award on items in dispute

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. Lear* and *P. V. Grasso*.

APPEARANCES: *Dave Watson* and *Bob McGibbon* for the Complainant; *R. M. Parry*, *Steven Wilson*, *Jack Proudman* and *Peter Cobbold* for the Respondent.

DECISION OF THE BOARD; January 14, 1991

1. Having regard to the Minutes of Settlement filed by the parties in Board File No. 3079-89-U, and to the provisions of section 40a of the *Labour Relations Act* (the "Act"), we hereby direct the settlement by arbitration of the first collective agreement between the parties. Pursuant to section 40a(3) of the Act the parties are agreed that the Board arbitrate that settlement.

2. There are two outstanding matters that arise in the context of Board File No. 1872-90-FA and pursuant to the parties' Minutes of Settlement. The first is the settlement of the first collective agreement between the parties (the "interest dispute"). The second concerns a dispute between the parties with respect to the legal effect, and remedy if any, of the employer's action in reducing hours of work. It is alleged by the applicant that the employer violated section 79 of the Act and that compensation is owing to the employees involved. The respondent employer disputes this assertion. This decision deals only with the settlement of the first collective agreement. A decision with respect to the allegation of a violation of section 79 will issue in due course.

3. Counsel for the parties convened before the panel to deal with certain procedural questions. It was agreed that the respondent would proceed first. Prior to the hearing the parties exchanged and filed written briefs. Upon convening the hearing each party advised the panel that it would not be calling any *viva voce* evidence.

4. The items agreed to between the parties were filed and appear as Appendix 12 at tab 12 of the respondent employer's brief, save and except Appendix B and certain portions of Article 8. Articles 8.01 and 8.05 as set out in Appendix 12 of the employer's brief constitute agreed-to language between the parties. Articles 8.02, 8.03 and 8.04 are in dispute between the parties. In addition, the parties are in dispute with respect to Appendix B, which is the wage schedule to be attached to and will form part of the collective agreement. The parties are also in dispute with respect to payment of retroactivity.

5. The parties are agreed that the collective agreement will be effective for a period of two years from the date of this award.

6. We note that the parties have been successful in negotiating the substantial portion of their collective agreement and in essence those matters remaining in dispute relate to the level of wages to be paid.

7. As the Board has done in previous interest arbitrations pursuant to section 40a of the Act, we do not intend to give detailed reasons for our award. We are dealing with a bargaining unit of eleven employees and there are six classifications of employees covered by the collective agree-

ment. In five of those classifications there is currently only one individual employed. In the processor classification there are currently six employees.

8. The employer engages in the processing and distribution of custom bingo supplies. Flat stock is shipped from the employer's U.S. parent company. The flat stock is "pulled", collated, cut, glued, cut again, and then wrapped, packaged and shipped.

9. The company has been in operation in Mississauga since May 1, 1988. The company's parent operations comprise three locations in the United States, with more than four hundred hourly employees. The majority are employed at the parent company's head office in Cleveland.

10. The employer's wage proposal incorporates a number of different elements. It proposes to institute a grid providing for increments at six month intervals to a maximum rate achieved at an eighteen-month service level. The employer's proposal also seeks to introduce a merit payment to be paid at the sole discretion of the employer. In addition, it seeks to retain the right to "maintain, amend, eliminate, or reinstate any existing incentive program at its sole discretion" (the "T.E.A.M. program"). Finally, in determining rates of pay, the employer proposes a wage increase of a minimum \$.25 per hour to each employee, in year one, provided such increase does not exceed its wage rate proposal including merit pay. In the second year of the collective agreement, the employer proposes a minimum increase of \$.20 per hour on the same basis.

11. The union's wage proposal contemplates no grid. It provides for a single rate in each classification for each of the two years of the collective agreement.

12. The focus of the employer's submission with respect to wage rates was that the level of productivity in the Mississauga plant was below its expectation. Consequently, each of the features of its wage proposal attempted to address in various ways the issue of productivity of the employees.

13. The issue of productivity is of concern to any employer in the management of its business. However, how productivity is defined and then secondly, how it is measured in any particular operation is obviously variable. Counsel for the employer makes the point that the employer has set a level of productivity in expectation of its desired rate of return at this plant in circumstances where it can produce the same product elsewhere. Obviously, a union, the employees, and an employer run a risk if a company determines to operate at a particular level of production and that level is not forthcoming. However, in our view, that does not address the issue before us. The employer's proposal seeks to incorporate in the employees' hourly wage rate a considerable factor based on its desired level of production. Notwithstanding that this plant is largely a manual operation, we simply are not persuaded that the employer's approach is appropriate at this time and in the context of a legislated first collective agreement. Firstly, we have no information as to the nature of the production or operation at the U.S. plant from which the desired level of productivity has been determined. We cannot compare the nature of that operation, its equipment, its size, its workforce or its structure with this plant. We cannot be satisfied that the proposals are ones which address issues specific to this plant.

14. Further, the proposed merit system is completely discretionary to the employer. Notwithstanding an acknowledgement by counsel for the employer that any such merit program would have to be implemented and administered fairly with respect to the employees, there is nothing in the employer's proposal to indicate when it might be paid, whether the amounts indicated constitute maximums but not minimums, and there are no criteria set out that link the payment of the merit system to any issue of productivity. Similarly, the productivity bonus plan is at the sole discretion of the employer to implement or eliminate at any time. This is a plan that has been adopted

from the parent company (which does not appear to be unionized) and its terms have not been made the subject of negotiation with this trade union.

15. In support of its proposals, the employer advances the argument that the employees would, through the implementation of the merit payment and the T.E.A.M. program, earn more money than the union is seeking. This assumes that the level of productivity set is attainable, reasonable, attributable to the employees, and that the payments will be made. However, absent the implementation of both the merit and the T.E.A.M. plan the parties' wage proposals are not widely divergent. In fact, in three of the six classifications, the rates proposed by each party (absent the merit and incentive payments) are the same.

16. Finally, we note that contrary to the employer's assertion, its proposal is not a simple one. In order to determine any particular employee's rate of pay one could not simply look to the wage schedule. It would be necessary to make a number of calculations taking into account a variety of factors. In the context of a legislated first collective agreement, we prefer to take a more conventional approach to issues of compensation. These are proposals that in the circumstances are more properly left to subsequent negotiations.

17. The union opposes the implementation of a grid. The employer seeks to implement a grid both in response to its stated productivity concerns and as a means to reconcile rates within classifications. In reviewing the agreed-to language in Appendix 12, we note that the parties have agreed to a probationary period for employees of ninety days in the bargaining unit. It also appears that the employer has some discretion with respect to the continuation of the employment of a probationary employee. These provisions provide the employer with considerable opportunity to review the performance of individual employees in order to determine whether they will meet the requirements of the job. In that regard we accept that there is a review of productivity during the probationary period. In reviewing the various job duties of employees in the bargaining unit, we are also of the view that during a ninety day probationary period the employer would be able to determine whether or not the employee is meeting the employer's expectation with respect to productivity. Therefore, we are prepared to award a grid comprised of a start rate with an increment upon completion of the probationary period.

18. We would also make the following comments. The adjudication of an interest dispute between two parties is, in our view, a qualitatively different type of adjudication from other proceedings under the Act. The function of an adjudicator in an interest dispute is to, in essence, complete the process of negotiations that has up to that point, failed between the parties themselves. Obviously, the award of an interest arbitration board is final and binding upon the parties. However, there appears to be no particular onus attributable to either party in the context of an interest dispute. (Nor is there any particular magic in which party proceeds first. In this case it made sense, and the parties agreed, that the employer proceed first because of the outstanding section 89 allegation.) Both parties are putting forward proposals which they seek to have the Board adopt and incorporate into its award which will form the actual terms and conditions of employment for the employees in the bargaining unit. In interest disputes before the Board pursuant to section 40a of the Act, the Board has a broad discretion to determine those issues that remain in dispute between the parties. The result is the completion of the negotiating process and the creation of the collective agreement between the parties.

19. The means by which parties generally seek to persuade an interest arbitration board is by way of material contained in written briefs. A real issue is the question of the weight to be attributed to that material. A failure to substantiate through the use of background information, of

statistics, or other supporting documentation by either party may well limit the value of any assertion made to the adjudicator.

20. For example, it is unlikely that a panel will accord much weight to an employer's bald assertion that it is unable to pay higher wages. Where an interest arbitration arises between parties in the private sector (whether on consent or pursuant to section 40a) and the employer relies on an inability to pay argument, it can expect to have to explain and justify its financial proposal. Information not exchanged through the negotiation process for strategic or other reasons may well be required in order to satisfy an interest arbitration board of the impact of a proposal on both parties and whether its adoption seems appropriate in all the circumstances. In the absence of such specific information, a board is compelled to refer to other more generalized factors in coming to its decision. The amount of information and supporting documentation provided is balanced of course with the expedited time frame available under section 40a for the determination of the issues.

21. Having regard therefore to all of the above, our award with respect to the items in dispute is as follows:

Article 8 - Wages

[8.01 Agreed to item - Article 8.01]
[Appendix 12 (employer brief).]

8.02 The wage schedule in Appendix B will be effective from January 14, 1991. Employees will be paid during their probationary period at the start rate. Upon completion of their probationary period, employees will advance to the next level of pay within their classification.

[8.03 Agreed to item - Article 8.05 of]
[Appendix 12 (employer brief).]

Appendix B

Hourly rate:

	Effective January 14, 1991		Effective January 14, 1992	
	Start Rate	Upon Completion of Probationary Period	Start Rate	Upon Completion of Probationary Period
Cutter	8.50	9.35	8.85	9.70
Driver	8.85	9.75	9.45	10.35
Shipper/Receiver	9.55	10.50	9.95	10.90
Material Handler	7.15	7.85	7.50	8.20
Processor	6.80	7.45	7.25	7.90
Lead Hand	8.55	9.40	8.90	9.75

22. Employees are to be placed on the grid in accordance with their current length of service. For purposes of clarity, we note that the probationary period is ninety days in the bargaining unit. Therefore, employees who change classifications (excluding situations covered by Article 12.02 of the agreed-to items regarding temporary transfers) and who have already completed their probationary period will immediately move to the top level of the grid of the new classification.

23. On the issue of retroactivity, the employer proposes a lump sum 'signing bonus' to each employee in the bargaining unit. The union seeks full retroactivity on wages paid back to the date of the notice to bargain, November 28, 1989. We note that while two employees have only recently been hired, eight employees have not had wage increases for periods ranging between fifteen and nineteen months. One employee received an increase in January 1990.

24. Due to the small size of the bargaining unit we have, in this case, been able to consider likely and reasonable expectations of the employees as well as the cost to the employer of a retroactivity payment. In the circumstances of this case, balancing the various seniority dates of the employees, the various dates of their last wage increases, the fact that this is a first collective agreement and recognition of the negotiating process itself, we award a retroactive payment as follows. Employees shall be paid a lump-sum amount of \$350.00 each or a retroactive payment calculated as though the wage rate effective the date of this award took effect one year after the date of the employee's last wage increase, whichever is greater. However, in no case shall the amount payable exceed \$650.00.

25. For purposes of clarity we provide the following two examples. An employee whose last wage increase was May 14, 1989 is entitled to \$350.00 or a retroactive wage payment calculated on the basis of hours paid from May 14, 1990 to the date of this award, whichever is greater. An employee hired within the year prior to the date of this award will be entitled to a lump sum payment of \$350.00. We note that in no case would this result in a payment that would be retroactive to a date prior to the date of the notice to bargain.

26. We direct that the collective agreement contain the items agreed to as referred to in paragraph 6 of this decision and our award with respect to the items in dispute. Should the parties have any dispute with respect to the preparation of the actual document we will remain seized in order to ensure that the collective agreement is prepared by the parties forthwith.

ADDENDUM OF BOARD MEMBER J. LEAR; January 14, 1991

27. I would simply add the following comments. The employer expects a 4.1 case per hour production level, a level that has been met at one of its three U.S. parent operations. In comparing that figure with the average output of this plant over the course of its operation there appears to be a shortfall of some 40 per cent. If the expectation is reasonable, I am hard-pressed to accept that the employer has not been able to determine with some considerable specificity the reasons for that lack of production and further that it has not undertaken action to change those factors. It has been a concern to the employer throughout its time of operation in Mississauga.

28. In my view, a production incentive scheme is at its most efficient when applied to a unit whose members are able to produce at a rate which cannot be adversely affected by the rate of production of any other part of the operation. In such a situation, the unit is self-regulating and poor individual performers are not long tolerated within it by the other members. Where the scheme is applied comprehensively to the whole operation, the total rate of production is dictated by the rate of the lowest performing unit. In this situation, failure by management to identify and correct problem areas may in fact result in a 'disincentive' situation, where workers in a well-performing unit lose heart and slack off as, in spite of their best efforts, they are not earning bonus due to poor performance in other parts of the operation.

29. A production incentive scheme should be designed specifically for the operation to which it relates. Even where identical items are produced from two separate locations, there are almost certainly differences. Some of these may be due to availability of better or more experi-

enced labour, the state of the local employment market, layout of the production run, unidentified production bottlenecks, more or less mechanization, 'doubling up' of some mechanical operations and distribution of the work force, the environmental appeal of the workplace, quantity of orders on the books and the relationship between management and workers. Because of these variable factors, any incentive scheme should be tailored to local conditions. Also, the point at which production output is gauged is important. Some recognition of "work-in progress" may be required.

30. Also, in attempting to plan and implement a production-related incentive scheme, it is vital to involve the workers and their union representative(s) at an early stage in the planning to ensure full co-operation and the greatest chance of success. It is often the person on the shop floor who has the best knowledge of problem areas in the production process.

2442-89-M United Steelworkers of America, Local 7921, Applicant v. Camco Inc., Respondent

Employee - Employee Reference - Evidence - Practice and Procedure - Labour Relations Officer conducting inquiry ruling proffered evidence inadmissible - Employer challenging ruling and asking Board to direct Officer to permit it to call evidence in question - While Board reluctant to intervene in Officer's inquiry, it will do so in appropriate circumstances - Board satisfied that evidence establishing "historical dimension" of duties and responsibilities arguably relevant and directing Officer to permit employer to adduce the evidence

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Balentine*.

DECISION OF THE BOARD; January 9, 1991

1. This is an application, under section 106(2) of the *Labour Relations Act*, for a determination by the Board of whether or not a number of individuals are "employees" within the meaning of the Act.

2. In accordance with its usual practice in such applications, the Board authorized a Labour Relations Officer to inquire into and report to it with respect to the duties and responsibilities whose status is in issue between the parties. In the course of the inquiry by the Officer designated to do it, a question has arisen with respect to the admissibility of certain evidence which the respondent employer seeks to call and which the Officer has ruled inadmissible.

3. By letter dated December 3, 1990, and pursuant to Board Practice Note No. 4, the respondent challenges the Officer's ruling and asks that the Board direct the Officer to permit it to call the evidence in question. By letter dated December 20, 1990, the applicant takes the position that the Officer "was and is in the best position to make ... a determination" with respect to the admissibility of the evidence in question and the Board should not interfere with his ruling.

4. The respondent describes the evidence which the Officer has ruled inadmissible as including:

...the collective agreements entered into between the parties, bargaining history between the parties material to the status of employees in question, evidence relating to grievances filed by

the Applicant with respect to the positions concerned and the manner in which these grievances were resolved, and historical evidence relating to the creation and bargaining unit status of a number of positions in dispute.

The respondent indicates that it intends to use this evidence to establish the “historical dimension” of the duties and responsibilities of a number of the persons whose status is in issue in this application. In its response, the applicant writes that:

We have carefully reviewed the submissions of the respondent, and have noted the jurisprudence cited. We are aware that the Board has often stated that the “historical context” may be relevant in certain circumstances, and such evidence will be subject to a determination of the appropriate weight to be given in each case. However, we are also concerned with preserving expeditiousness of the instant process. We believe that the Board Officer examination procedure, and more specifically Section 10 of Practice Note #4, are aimed at ensuring the speedy resolution of “status” disputes. The attempt by a party to introduce irrelevant evidence may frustrate this aim.

5. Paragraphs 6, 10, 11, and 14(b) and (c) of Board Practice Note No. 4 provide that:

6. All the evidence concerning the matters which he is authorized to inquire into must be placed before the Labour Relations Officer, and, subject to the exceptions noted below, no party will be afforded an opportunity to supplement its evidence at any subsequent hearing before the Board.

10. If a party wishes to present evidence on matters that the Labour Relations Officer considers to be beyond the scope of his authority to entertain, the Labour Relations Officer will not permit such evidence to be adduced but shall obtain from the party and record in his report a brief statement of the nature of the evidence proffered and shall note his ruling with respect to such evidence. *The party is to be advised that it has the right to challenge the Labour Relations Officer's ruling by making representations in writing to the Board.*

11. If none of the parties desire to call any witnesses, or if the parties have called all their witnesses and the Labour Relations Officer has not refused to entertain any of the evidence submitted, the Labour Relations Officer will state in his report that full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues before him was afforded to all parties. If the Labour Relations Officer has rejected certain testimony proffered by one of the parties, he will indicate that full opportunity to be heard was afforded the parties *except with respect to the evidence rejected.*

14. Objections to the accuracy of the Labour Relations Officer's report must be limited to

• • •

- (b) Additional evidence which was tendered by the parties to the Labour Relations Officer but which was ruled inadmissible by the Labour Relations Officer at the time of the examination.
- (c) New evidence which could not have been discovered by reasonable diligence at the time of the examination.

[emphasis added]

6. The Board has previously indicated that it is reluctant to intervene in inquiries conducted by its Labour Relations Officer because of the delays that this would engender in circumstances where the concerns of the parties could be addressed by the Board, in accordance with Practice Note No. 4, after the inquiry was completed (see, for example, *Maple Engineering & Construction Canada Ltd.*, [1990] OLRB Rep. Nov. 1142, *Dunmark Electric (Ancaster) Limited*, [1988] OLRB Rep. May 489, *Strongland Construction Ltd.*, [1987] OLRB Rep. Oct. 1330 and *Kaneff Properties Limited*, [1980] OLRB Rep. Nov. 1653). In that respect, the Board may, in appropriate

circumstances, permit a party to adduce evidence which has been ruled inadmissible by a Labour Relations Officer in a hearing before the Board after the Officer has completed his/her inquiry.

7. While the Board is reluctant to intervene in an Officer's inquiry, either by ruling on the correctness of the Officer's evidentiary rulings or otherwise, it will do so in appropriate circumstances. Indeed, paragraph 10 of Practice Note No. 4 contemplates this possibility.

8. In this case, we are satisfied that the evidence which the Officer has ruled inadmissible is arguably relevant to the matters and issue in this application (though what weight might be given to such evidence is quite another matter and cannot be determined until all of the evidence is before the Board). Indeed, even the applicant appears to admit its relevance. The applicant's primary objection seems to be that allowing the respondent to adduce the evidence will slow down the proceeding. Of course, it takes time to adduce all evidence. That cannot be used as a basis for ruling relevant evidence inadmissible, except perhaps in circumstances where its relevance is so marginal and would consume so much hearing time that it would not be in the interests of justice to allow it to be adduced. In the circumstances herein, and having regard to the Board's comments in *The Windsor Star*, [1988] OLRB Rep. Apr. 427 and subsequent cases, it cannot, at this stage, be said that the evidence which the respondent seeks to adduce in the Officer's inquiry herein is of marginal relevance.

9. Accordingly, we find it appropriate to direct the Officer to permit the respondent to adduce the evidence described in the second paragraph of its December 3, 1990 letter (see paragraph 4, above).

1953-90-M Canadian Union of Public Employees Local 1997, Applicant v. Eastern Ontario Health Unit, Respondent

Employee - Employee Reference - Union making application under section 106(2) of the Act - Board stressing importance of particularizing basis for section 106(2) application and providing information as set out in *Windsor Star* case - Board satisfied that union provided sufficient information to define issue between the parties - Board authorizing Labour Relations Officer to conduct inquiry

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *P. V. Grasso*.

DECISION OF THE BOARD; January 4, 1991

1. By letter dated October 23, 1990, which though addressed to the "Ministry of Labour" was no doubt intended to be to this Board, the applicant trade union requested "... the appointment of an officer pursuant to section 106(2) of the *Ontario Labour Relations Act* to examine the positions of Consultant." [sic]. The applicant's letter goes on to provide the name of the respondent employer, the name, address and telephone number of the "Employer contact", and the names of thirteen individuals whose employee status the applicant asserts is in dispute between the parties.

2. The Registrar has treated the applicant's letter as an application, under section 106(2) of the *Labour Relations Act*, for a determination as to whether the thirteen named individuals are

“employees” within the meaning of the Act, which is no doubt what it was intended to be. By letter dated October 29, 1990, the Registrar advised the applicant that the Board would be unable to process its application further until the applicant provided the addresses of the thirteen individuals and the information which the Board’s decision in *The Windsor Star*, [1988] OLRB Rep. Apr. 427 indicated are necessary in order for the Board to process applications like this one. At paragraph 14 of *The Windsor Star*, *supra*, the Board observed that:

Therefore, the Board will no longer restrict the evidence to be adduced before a Board Officer with respect to the duties and responsibilities of the person(s) in dispute to “changes” in those duties and responsibilities, as in the past. Section 106(2) applications commonly are initiated through an often sparse letter to the Board merely naming the individual(s) in dispute. Henceforth, the applicant must, in addition, indicate the basis for the application, i.e., the nature of the position, including duties and responsibilities (to the extent known, where the applicant is a trade union), the historical dimension to the position (if any) including any Board determinations and parties’ agreements and how the mischief against which sections 1(3)(b) or 12 are directed has arisen or has ceased. The respondent must outline fully any grounds it asserts as to why the Board should not entertain evidence as to the duties and responsibilities of the person(s) in dispute. The Board must be satisfied a “question” has arisen as to the “employee” or “guard” status of the individual(s) in dispute before a duties and responsibilities examination will be directed. Where the individual’s status has not been previously determined by the Board in a certification or earlier 106(2) application or by specific agreement of the parties, an examination will generally be directed. Where the Board has previously determined the status of a person in a certification application or prior section 106(2) application or where the parties have reached a specific agreement as to the person’s status, the Board will not permit evidence as to the person’s duties and responsibilities to be adduced before a Board Officer unless the Board is satisfied, on the face of the application, that it appears the mischief against which section 1(3)(b) or section 12 is directed has arisen or has ceased. Where the Board is not so satisfied, the application may be dismissed without a hearing. In the Board’s opinion, this policy does not undermine agreements of the parties as to a person’s status and avoids repeated or frivolous examinations, yet provide sufficient flexibility to adequately respond to circumstances where the mischief against which sections 1(3)(b) and 12 are directed has arisen or has ceased.

3. By letter dated November 13, 1990, the applicant advised the Registrar that “... the addresses for the persons whose employee status is in dispute will have to be submitted by the employer.” We take this to mean that the applicant does not have that information. Further, by letter dated November 21, 1990, the applicant advised the Board that:

Further to my letter of November 13, 1990, and in compliance with the Board’s request we offer the following:

During the term of the present collective agreement, the Medical Officer of Health has reorganized the workplace.

The individuals whose status is in dispute were formerly “Directors”. Inherent in these positions were authoritative responsibilities and were excluded from the Union. With the reorganization, the Medical Officer has removed the authoritative lines of authority from these individuals as well as it relates to previous positions.

The Employer has not submitted any job descriptions to the Union, thus it is not possible to state further changes.

Hoping the foregoing meets with your approval.

Yours truly,

“A. Lamoreux”
André Lamoreux
Representative

4. By letter dated December 3, 1990, the respondent has requested particulars from the applicant pursuant to section 72(3) of the Board's Rules of Procedure. The respondent asserts that the applicant has failed to provide the information which the Board has indicated must be provided before an application under section 106(2) can be processed, either as requested by the Board or otherwise, and that, as a result, the respondent is hampered in its ability to respond to the application.

5. There are a significant number of applications under section 106(2) of the Act filed with the Board each year (for example, between January 1 and December 28, 1990 the Board received 53 such applications). For many matters which come before the Board there is a specific form for making the complaint or application, as the case may be. Unfortunately, there is no such form for applications under section 106(2). It appears that the only guidance available to a party wishing to make such an application is in the Board's jurisprudence. This is no doubt one reason why, in altogether too many cases, the parties and the Registrar spend several months exchanging correspondence before an application can be processed even to the point of a Labour Relations Officer being appointed to inquire into the duties and responsibilities of the person(s) whose "employee" status is in issue. The Board is presently reviewing the situation for the purpose of determining what, if anything, can be done to expedite such applications. In the meantime, the parties would do well to take heed of the Board's comments in *The Windsor Star*, *supra*, as aforesaid. The Board's comments in that decision were intended to indicate to the community that it is necessary to particularize the basis for an application under section 106(2) of the Act. Such information enables the Board to determine whether there is an issue between the parties which is the proper subject matter of an application under section 106(2) at an early stage. And, if it is, it also serves to define the issue(s), which tends to facilitate settlement discussions or, if a settlement cannot be achieved, a more structured and expeditious litigation of the dispute.

6. The parties could also do themselves (and this Board) a favour by responding properly to the Registrar's request for further information. In the Board's experience, much of the delay which occurs in the processing of section 106(2) applications is a direct result of the failure of an applicant to provide the necessary information as requested in a timely manner, or sometimes at all.

7. Although sparse in detail, the information provided by the applicant in this case reveals that the persons whose "employee" status is an issue between the parties were previously classified as "Directors" and are now classified as "Consultants", and that the applicant alleges that as a result of the reorganization of the workplace by the respondent, these persons no longer exercise managerial functions. In our view, the applicant has provided sufficient information to define the issue between the parties and to enable the respondent employer to respond to the application (particularly since the respondent employer is probably in the best position to provide a comparison of what "Directors" did to what "Consultants" do).

8. Consequently, the Board finds it appropriate to authorize a Labour Relations Officer, to be designated by the Board's Manager of Field Services, to inquire into and report to the Board with respect to the duties and responsibilities of the persons named by the applicant in its October 23, 1990 letter.

9. We do wish to remind the parties that, in an application under section 106(2) of the Act, the Board does not determine whether or not a person with respect to whom such an application has been made is or is not an employee in a bargaining unit. The issue before the Board is whether or not such a person is an "employee" within the meaning of the *Labour Relations Act*. Although a determination of a person's "employee" status may, for practical purposes, go some

way toward resolving an issue with respect to whether or not that person is in a bargaining unit, the two issues are not necessarily congruent. A finding that a person is an "employee" will not necessarily mean that the person is in the bargaining unit or vice versa. Whether or not a person is an employee in the bargaining unit is a question for a Board of Arbitration to determine (see *Re Miller et al and Algoma Steelworkers Credit Union Ltd., et al.*, (1974) 6 O.R. (2d) 676 (Ont. Div. Ct.); *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500; *Northern Telecom*, [1983] OLRB Rep. Jan. 95; *The Windsor Star*, *supra*). Consequently, a determination of the "employee" status of the thirteen individuals named by the applicant will not necessarily mean that they, or any of them, are or are not in the bargaining unit covered by the collective agreement between the parties.

**2526-89-G International Brotherhood of Electrical Workers, Local 894, Applicant
v. Ellis-Don Limited, Respondent**

Construction Industry - Construction Industry Grievance - Evidence - Board ruling reports prepared for Ministry of Labour in 1980 by George Adams admissible for purpose of showing mischief which existed prior to certain amendments to *Labour Relations Act* - Board to hear parties' submissions concerning probative value of the material

BEFORE: S. A. Tacon, Vice-Chair, and Board Members J. Trim and J. Redshaw.

APPEARANCES: A. M. Minsky, Robert Hill and Arlene Huggins for the applicant; Roy Filion, Frank Angeletti and Paul Richer for the respondent.

DECISION OF S. A. TACON, VICE-CHAIR AND J. REDSHAW, BOARD MEMBER: January 25, 1991

1. As agreed by the parties on the last day of hearing, the parties filed written submissions with the Board with respect to respondent counsel's objection to the admissibility in argument of a report and supplementary report prepared for the Ministry of Labour in 1980 by George W. Adams, Special Counsel (at that time).

2. Having regard to those submissions the Board finds that the report and the supplementary report are admissible for the purpose sought by counsel for the applicant, that is, to show the mischief, in Mr. Adam's view, which existed prior to the amendments to the *Labour Relations Act* in question.

3. The parties also agreed on the last day of hearing that, if the material in question was ruled admissible, the parties would then address the question of the probative value of such material. Accordingly, the Board affords the parties the opportunity to address that matter in writing as follows:

- (a) submissions from Mr. Minsky due two weeks following the release of this decision;
- (b) response by Mr. Filion no later than two weeks following the deadline in (a);

- (c) reply submissions, if any, by Mr. Minsky no later than one week following the deadline in (b).

DECISION OF BOARD MEMBER J. TRIM: January 25, 1991.

I dissent.

0332-90-U Ontario Nurses' Association, Complainant v. George St. L. McCall Chronic Care Wing of the Queensway General Hospital, Respondent

Change in Working Conditions - Hospital Labour Disputes Arbitration Act - Unfair Labour Practice - Employer challenging Board's jurisdiction to hear "freeze" complaint and to grant relief requested by Union - Employer arguing that "freeze" complaint should be heard by interest board of arbitration constituted under Hospital Labour Disputes Arbitration Act - Board noting distinction between "interest" issues to be determined by arbitration and "rights" issues raised by unfair labour practice complaints, including alleged "freeze" violations - Board satisfied that it has jurisdiction to hear "freeze" complaint

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members J. A. Ronson and H. Peacock.

DECISION OF THE BOARD; January 23, 1991

1. This is a complaint to the Board, under section 89 of the Labour Relations Act, in which the complainant trade union alleges that the respondent employer has acted in a manner contrary to the "freeze" provisions of section 13 of the *Hospital Labour Disputes Arbitration Act* (the "HLDAA") and section 79 of the *Labour Relations Act* (the "LRA"), and also contrary to section 66 of the LRA.

2. The respondent challenges the Board's jurisdiction to hear the complaint insofar as it alleges that the respondent has breached section 13 of the HLDAA and section 79 of the LRA. In the alternative, the respondent submits that the Board has no jurisdiction to grant the relief requested by the complainant. The complainant requests that the Board:

1. Declare the Employer has violated the *Labour Relations Act* and the *Hospital Labour Disputes Arbitration Act*.
2. Order the Employer to pay all members of the bargaining units the wage increases they should have received, retroactive to April 1, 1990.
3. Order the Employer to pay all members of the bargaining units a weekend premium of \$0.45 per hour for all relevant hours worked since April 1, 1990, with interest.
4. Order the Employer to comply with provisions of the Acts until such time as a collective agreement is in force.

5. Such other reasonable remedies as the Union may advise and the Board considers appropriate.
3. The respondent submits that:
 - (a) the remedy sought by the complainant, insofar as it seeks to alter the terms and conditions of employment, infringes the absolute jurisdiction of an interest arbitrator to set the terms and conditions of employment and to conclude a collective agreement between the parties and, as such, is beyond the remedial jurisdiction of the Board; and
 - (b) the remedy sought by the complainant is beyond the jurisdiction of the Board because section 79 of the LRA is expressly overwritten by section 13 of the HLDAA and the Board is without jurisdiction to entertain complaints that section 13 of the HLDAA has been breached because there is nothing in that Act which confers such jurisdiction upon the Board.

The respondent alleges that a complaint alleging a breach of the freeze provisions of the HLDAA is properly dealt with by an interest board of arbitration constituted under the HLDAA to settle a collective agreement between the parties.

4. The complainant submits that it has alleged that the respondent has violated section 79(1) of the LRA as modified by section 13 of the HLDAA and that, pursuant to section 2(2) of the HLDAA, the Board has jurisdiction to hear such a complaint under section 89 of the LRA.

5. Other than to note that the parties have made lengthy written submissions with respect to the respondent's objection to the Board's jurisdiction, we do not propose to attempt to summarize them further.

6. Sections 1(2), 2, 3, 4, 9, 11, 12, 13 and 14 of the HLDAA provide that:

1-(2) Unless the contrary intention appears, expressions used in this Act have the same meaning as in the *Labour Relations Act*.

• • •

2.-(1) This Act applies to any hospital employees to whom the *Labour Relations Act* applies, to the trade unions and councils of trade unions that act or purport to act for or on behalf of any such employees, and to the employers of such employees.

(2) Except as modified by this Act, the *Labour Relations Act* applies to any hospital employees to whom this Act applies, to the trade unions and councils of trade unions that act or purport to act for or on behalf of any such employees, and to the employers of such employees.

3. Where a conciliation officer appointed under section 16 of *Labour Relations Act* is unable to effect a collective agreement within the time allowed under section 18 of that Act, the Minister shall forthwith by notice in writing inform each of the parties that the conciliation officer has been unable to effect a collective agreement, and sections 17 and 19 of the *Labour Relations Act* shall not apply.

4. Where the Minister has informed the parties that the conciliation officer has been unable to effect a collective agreement, the matters in dispute between the parties shall be decided by arbitration in accordance with this Act.

• • •

9.-(1) The *board of arbitration* shall examine into and decide on matters that are in dispute and any other matters that appear to the board necessary to be decided in order to conclude a collective agreement between the parties, but the board *shall not decide any matters that come within the jurisdiction of the Ontario Labour Relations Board*.

(2) The board of arbitration shall remain seized of and may deal with all matters in dispute between the parties until a collective agreement is in effect between the parties.

(3) The *Arbitrations Act* does not apply to arbitrations under this Act.

• • •

11.-(1) *Notwithstanding* anything in the *Labour Relations Act*, no hospital employees to whom this Act applies shall strike and no employer of such employees shall lock them out.

(2) Sections 74 and 75, subsection 76(1) and sections 77, 92, 93 and 95 of the *Labour Relations Act* as amended or re-enacted from time to time apply *with necessary modifications* under this Act as if such sections were enacted in and form part of this Act.

12.-(1) *Notwithstanding* section 61 of the *Labour Relations Act*, where a trade union that has been certified as bargaining agent for a bargaining unit of employees of a hospital has given to the employer of such employees notice under section 14 of that Act and the Minister has appointed a conciliation officer, an application for a declaration that the trade union no longer represents the employees in the bargaining unit determined in the certificate may be made only in accordance with subsection 57(2) of the *Labour Relations Act*.

(2) *Notwithstanding* section 61 of the *Labour Relations Act*, where notice has been given under section 53 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of employees of a hospital to or by the employer of such employees and the Minister has appointed a conciliation officer, an application for certification of a bargaining agent of any of the employees of the hospital in the bargaining unit defined in the collective agreement or an application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit defined in the agreement shall not be made after the day upon which the agreement ceased to operate or the day upon which the Minister appointed a conciliation officer, whichever is later, except in accordance with section 5 or subsection 57(2) of the *Labour Relations Act*, as the case may be.

13. *Notwithstanding* subsection 79(1) of the *Labour Relations Act*, where notice has been given under section 14 or 53 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.

14. *Except where inconsistent* with this Act, sections 96, 97, 98, 99 and 101 of the *Labour Relations Act*, as amended or re-enacted from time to time, apply with necessary modifications under this Act as if such sections were enacted in and form part of this Act.

[emphasis added]

Section 79 of the LRA provides that:

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent

of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

(3) Where notice has been given under section 53 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 44 applies with necessary modifications thereto.

Section 89 of the LRA is an enforcement section pursuant to which a complaint alleging an unfair labour practice is made to the Board.

7. The HLDAA is directed at the process of collective bargaining in “hospitals”, as that term is defined in the Act. Otherwise, as section 2(2) of the HLDAA makes abundantly clear, the legislature intended that the provisions of the LRA apply to the employees, trade unions and employers to which the HLDAA applies, except to the extent that these maybe modified by the provisions of the HLDAA itself. There are several drafting techniques which have been used to accomplish this “modifying” effect. For example, in section 3 of the HLDAA it has been expressly stated that sections 17 and 19 of the LRA do not apply in the circumstances set out, sections 11(1), 12 and 13 of the HLDAA use the word “notwithstanding” to provide a modifying effect, and sections 11(2) and 14 of the HLDAA imply that specific provisions for the overall scheme of the HLDAA necessarily mean that certain provisions of the LRA may be modified. Other modifications occur by necessary implication. For example, section 73 of the LRA does not apply because no strike is lawful under the HLDAA, and the first contract provisions in section 40a of the LRA do not apply since the HLDAA provides a complete code for collective bargaining, including first agreement situations, in the hospitals sector.

8. The certification provisions of the LRA are unmodified by the HLDAA. The termination of bargaining rights provisions of the LRA apply as modified by section 12 of the HLDAA. Certain of the unfair labour practice sections of the LRA apply unmodified (see for example sec-

tions 64 through 70 of the LRA). Others, relating to unlawful strike or lock-out activity, apply with unspecified "necessary" modifications. Section 79 of the LRA has been modified, in part, by section 13 of the HLDAA.

9. Sections 13 of the HLDAA and 79 of the LRA prohibit an employer from altering working conditions in the circumstances set out therein. They are what are commonly known as "freeze" provisions. The purpose of such legislation is to facilitate the collective bargaining process by maintaining the totality of the employment relationship in the pattern existing at the time the freeze provisions came into effect, and thereby providing both a fixed point of departure and a period of stability for collective bargaining in which collective bargaining (see, for example, *A.N. Shaw Restorations Ltd.*, [1978] OLRB Rep. June 479, *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, *Simpsons Limited*, [1985] OLRB Rep. Apr. 594).

10. The LRA permits parties to a collective bargaining relationship to resort to the economic sanctions of a strike or lock-out, as the case may be, as part of the collective bargaining process, so long as they do so in a timely manner (namely, not during the term of a collective agreement and not before the conciliation process has been exhausted). The HLDAA does not. Section 11 of the HLDAA operates to modify the LRA in that respect by eliminating the distinction between the lawful and unlawful strikes and lock-outs and eliminates strikes and lock-outs from the collective bargaining process in the hospitals sector. Instead, the HLDAA stipulates that, where the parties are unable to effect a collective agreement between themselves, and the conciliation process has been exhausted, a collective agreement shall be settled between them by arbitration. As a sort of a *quid pro quo*, and in order to maintain the collective bargaining field as it was when notice to bargain was given, section 13 of the HLDAA has been implemented. It operates to modify section 79 of the LRA by stipulating that, once notice to bargain has been given, an employer may never alter any working conditions (except with the consent of the trade union which represents the employees in question) until the trade union's right to represent the employees has been terminated. In effect, clause 79(1)(a) of the LRA does not apply to employees, trade unions and employers covered by the HLDAA, or, to put it another way, the wording of section 13 replaces the wording of section 79(1) of the LRA. There is only one freeze provision which applies to employees, trade unions and employers covered by the HLDAA. Section 13 of the HLDAA and sections 79(2) and (3) of the LRA operate together as that provision.

11. The question of the Board's jurisdiction in complaints such as this one has never been challenged in quite the same way as it is by the respondent herein. The Board has, however, had occasion to consider whether an interest board of arbitration is the proper forum for such a complaint. Time and again the Board has dismissed such suggestions on the basis that the jurisdiction that an interest board of arbitration under the HLDAA and the jurisdiction of this Board are separate and distinct and that whether or not there has been a breach of the legislation is not a determination which can or should be made by an interest board of arbitration (see, for example, *Scarborough Centenary Hospital Association*, [1978] OLRB July 679, *St. Joseph's General Hospital*, Board File No. 0965-84-U(A), decision issued September 25, 1984, unreported, *Ottawa General Hospital*, Board File No. 0965-84-U(B) decision issued September 25, 1984, unreported, *Oshawa General Hospital*, [1985] OLRB Rep. Jan. 98).

12. In our view, the structure and provisions of the HLDAA indicate a legislative intention that there be a distinction drawn, as the Board has done, between the "interest" issues which are to be determined by a board of arbitration constituted under that legislation and the "rights" issues raised by unfair labour practice complaints, including complaints that working conditions have been wrongfully altered. We are satisfied that the Legislature intended that the Board hear and

determine such unfair labour practice complaints in the hospital sector; that is, complaints concerning employees, trade unions and employers covered by the HLDAA.

13. We are satisfied that this Board, and not an interest board of arbitration constituted under the HLDAA, has the jurisdiction to hear the complaint herein.

14. In issue in this complaint is not whether the complainant is trying to gain some sort of advantage within the collective bargaining process established by the HLDAA. Nor is it the complainant which is seeking to alter the terms and conditions of employment. Rather, the issue is whether the *respondent* has wrongfully altered working conditions, regardless of its motive for doing so. The complainant alleges that the respondent has done so and seeks to have that situation remedied. The Board must necessarily also have the jurisdiction to fashion an appropriate remedy in cases in which an employer is shown to have wrongfully altered working conditions.

15. We find it neither necessary nor appropriate to comment further on the issue of remedy until we have had the benefit of the evidence and representations of the parties.

16. This proceeding will continue as previously scheduled.

3201-88-U Sylvia Gronka, Complainant v. Hotel Employees and Restaurant Employees' Union, Local 75, Respondent v. Westin Hotel, Intervener

Duty of Fair Representation - Unfair Labour Practice - Complaint based on union's late referral to arbitration of employee's grievance under s.45 of the Act and subsequent referral to three-person board of arbitration - Board finding that late referral not a breach of the Act and that subsequent conduct of union reasonable in the circumstances - Complainant also alleging that union's failure to keep her adequately informed led her to reject company's settlement offer - Board find that union kept complainant fully apprised and that complainant acted against advice of union and its lawyer - Complaint dismissed

BEFORE: *Judith McCormack*, Vice-Chair.

APPEARANCES: *Elliott Posen*, *David Zimmer* and *T. Gronka* at various times for the complainant; *Ross Wells* and *Stan Urbain* for the respondent; *David Cote* for the intervener.

DECISION OF THE BOARD; January 22, 1991

1. This is a complaint under section 68 of the *Labour Relations Act* in which the complainant, Sylvia Gronka, alleges that the respondent conducted itself towards her in a manner that was arbitrary, discriminatory, or motivated by bad faith.

2. The complainant is a banquet waitress who was employed by the intervener company from September 12th, 1976 until the time of these events. On February 21st of 1987, she removed a piece of carpet from the company's premises, and was subsequently discharged for theft. The respondent union filed a grievance on her behalf on March 12, 1987 and a grievance meeting was held a week later. At that meeting, Donna Mlodinski, the banquet shop steward for the respondent, Stan Urbain, then assistant chief shop steward, and chief shop steward Man Kee Lui,

together with the complainant, attended on her behalf. Mrs. Gronka agreed that the union represented her well at that meeting. Nonetheless, the company rejected the grievance, and on March 24th, the members of the union's grievance committee unanimously recommended to the executive board that Mrs. Gronka's grievance be referred to arbitration. As a result, George Pineo, then the union's secretary/business manager, initiated arbitration proceedings under section 45 of the *Labour Relations Act* on March 25th, 1987.

3. Arbitrator Belinda Kirkwood was appointed by the Minister of Labour to hear the case and a hearing date of April 15th was set. Shortly before this date, Ms. Mlodinski, Mr. Urbain, and Mrs. Gronka met with union counsel Alick Ryder to prepare Mrs. Gronka's case for arbitration. On April 15th, Cledwin Lange, the union's business representative, Mr. Pineo and Mr. Urbain attended the hearing with Mrs. Gronka and Mr. Ryder.

4. At the hearing, the company's counsel, Cheryl Katz, pursued an objection to the jurisdiction of the arbitrator she had raised earlier. The essence of that objection was that the grievance had been filed one day after the expiry of the period under the collective agreement for referring a grievance to arbitration. Section 45(2) of the *Labour Relations Act* requires that a request under section 45 be made within the time stipulated in the collective agreement for referring a grievance to arbitration. The collective agreement which covers the complainant's bargaining unit specifies that a grievance must be referred to arbitration within five days of the third step reply. The union's position was that the past practice between itself and the company had been to interpret this provision as referring to working days rather than calendar days. As a result, Mr. Pineo's reference under section 45 cited March 26th as the deadline for referring the grievance to arbitration under the collective agreement, this being five working days after the company's reply dated March 19th. However, the company's position was that the five days set out in the collective agreement referred to calendar days, and that the request under section 45 should have been made by March 24, 1987. As a result, the company argued, the reference under section 45 dated March 25th was one date late, and the arbitrator had no jurisdiction to hear the case.

5. Mr. Ryder indicated to Ms. Kirkwood that the union intended to call evidence to the effect that the past practice between the employer and the union had been to treat the days listed in the collective agreement as working days. However, she ruled that there was no basis for receiving such extrinsic evidence, and from her remarks Mr. Ryder and the union officials concluded that she was going to rule against the union with respect to the company's objection as well. As a result, the union officials, Mr. Ryder and Mrs. Gronka discussed the matter, and decided to withdraw the reference under section 45 and refer the grievance to a three-person board of arbitration. This decision was based on arbitral jurisprudence to the effect that section 44(6) of the *Labour Relations Act*, which allows an arbitrator to extend the time limits in a collective agreement in certain circumstances, does not apply to section 45 referrals. There was no question that an arbitrator would have such discretion if the matter had been sent to a three-person board.

6. Mr. Ryder testified that he believed he then indicated to Ms. Kirkwood that the union was withdrawing the reference under section 45. There was some discussion between the company's counsel, Mr. Ryder and the arbitrator with respect to whether she would be issuing a decision subsequently, with Ms. Katz requesting that the grievance be dismissed and Mr. Ryder taking the position that no decision should be issued since the referral had been withdrawn. After the hearing concluded, Mr. Urbain spoke again to Mrs. Gronka and indicated that the union was now going to reapply for an arbitration by a three-person board. He told her not to get discouraged, and that although the union had suffered a setback, "it wasn't over yet".

7. Subsequently, counsel for the company wrote to Ms. Kirkwood asking for a decision dismissing the grievance. On April 20th, Ms. Kirkwood replied as follows:

As the Union has withdrawn the grievance in the abovementioned matter, I do not have any jurisdiction to issue an Award.

My Statement of Account will follow under separate cover.

She also wrote to Jean Read, the Director of the Office of Arbitration in similar terms:

I wish to advise you that the Union withdrew the grievance in the above-mentioned matter on April 15, 1987.

Then on April 21st, Mr. Pineo wrote the following letter to the Office of Arbitration:

Local 75, Hotel Employees Restaurant Employees Union wishes to withdraw from Arbitration the aforementioned application that was scheduled this date.

8. When Elizabeth Mangaoang received this letter in her capacity then as assistant to the supervisor for section 45 cases in the Office of Arbitration, she pulled out the file and noticed that it had already been closed because of Ms. Kirkwood's letter. In addition, the arbitration had been set up for April 15th which had already passed. As a result, Ms. Mangaoang called Mr. Pineo to clarify the situation. Ms. Mangaoang testified that she asked Mr. Pineo what he had meant by his letter, and that he replied that it was for her record purposes so that she could close her file, and that the grievance had been withdrawn. She made a note to this effect on the bottom of Mr. Pineo's letter of April 21st.

9. By a letter also dated April 21st, Mr. Pineo appointed Mike Pratt as the union's nominee to a three-person board of arbitration. The company then nominated Michael Gordon as its nominee on a "without prejudice" basis. The reason for this reservation was that the company objected to the constitution of a three-person board on the grounds that the matter had been disposed of by Ms. Kirkwood. Mr. Ryder and Mr. Pratt subsequently discussed possible arbitrators to chair the three-person arbitration board, and there was also some discussion between Mr. Ryder and Mr. Gordon in this regard. This culminated in Mr. Pratt writing a letter to the company suggesting the names of five arbitrators. On May 27th, counsel for the company wrote back renewing her objection and without commenting on the union's suggestions for a chair.

10. Several weeks later, Mr. Ryder wrote to the Office of Arbitration indicating that the nominees could not agree and requesting that the Minister of Labour appoint a chair. Ten days later, the company wrote to Ms. Read requesting that the Minister refrain from appointing a chair and reciting the company's objection. On August 12th, Mr. Ryder wrote to Ms. Read responding to the company's letter, and shortly thereafter, Ms. Read wrote to Ms. Katz to the effect that the Minister was prepared to appoint an arbitrator, and any concerns about arbitrability could be raised before the arbitration board. This was followed by a further objection from the company, and a suggestion by it that the Kirkwood hearing be reconvened. On August 24th, Ms. Read wrote to the parties indicating that the Minister of Labour had appointed Donald Franks to chair the three-person board of arbitration.

11. Some time in August, Thomas Gronka, Mrs. Gronka's adult son, spoke to Mr. Urbain with respect to why it was taking so long for Mrs. Gronka's grievance to be heard. Mr. Urbain told him that although a three-person board would have greater leeway or authority to deal with the timeliness problem, it did involve a considerable amount of delay. He said that it often took a long time to set up such a board, especially if the two nominees could not agree on a chair, and he

explained the timeliness problem to Mr. Gronka. In August of 1987, Mr. and Mrs. Gronka also visited the Ministry of Labour to inquire why nothing had been done with respect to Mrs. Gronka's grievance. At that time they spoke briefly to Ministry of Labour staff with inconsequential results.

12. From July of 1987 to January of 1988 Mr. Urbain received many telephone calls from both Mrs. Gronka and Mr. Gronka. During these calls Mr. Urbain explained why the case was taking so long, and discussed the merits of Mrs. Gronka's grievance. He also raised with both Mr. and Mrs. Gronka the fact that Mrs. Gronka had a duty to mitigate her damages. Mr. Urbain was concerned that Mrs. Gronka was not making any attempt to find another job in the interim.

13. In November of 1987, Mrs. Gronka received a letter from the company making an offer to settle her grievance on the basis that it would pay her three months salary on the condition that she would resign from employment. She and her son visited Mr. Ryder's office to discuss this letter and inquire further about the case. Mr. Ryder called Mr. Pineo while Mr. and Mrs. Gronka were in his office to tell him that they had come in to see him. Mr. Pineo was concerned about a grievor contacting the union's lawyer directly, because the consultation would cost the union money and Mr. Pineo could have dealt with their inquiries himself. Nevertheless, he agreed that Mr. Ryder should talk to Mr. and Mrs. Gronka. Mr. Ryder then explained in detail what had been happening since April, and while Mr. and Mrs. Gronka were in his office he called Mr. Pratt to ask him to get a date for the hearing as soon as possible. He also drew a diagram of the difference between the section 45 route and the section 44 route for arbitration, and explained the delay involved in constituting the three-person board. He further advised Mrs. Gronka that in his view, they could make a better deal than that contained in the company's letter.

14. On November 17th Ms. Katz wrote to Mr. Ryder confirming an arbitration date of January 6th, and indicating that she would be pursuing the company's objection at that time. Mr. Ryder then notified Mrs. Gronka of the hearing date. Mr. Gronka testified that he and the complainant subsequently consulted their own lawyer, Elliott Posen, in December. Some weeks later, in January, Mrs. Gronka made a request to the Office of Arbitration under the provisions of the *Freedom of Information and Protection of Individual Privacy Act*. Among other things, she received copies of Mr. Pineo's letter of April 21st and Ms. Kirkwood's letter of April 20th to Ms. Read as a result of that request.

15. The hearing before the Franks board commenced on January 6th, 1988. The company raised its objection which at this point had two aspects: first, that the union had previously withdrawn the grievance itself and not just the referral to arbitration, and secondly, that in the alternative Ms. Kirkwood had disposed of the matter. There was some discussion of the preliminary objection, and then negotiations were initiated by the two nominees on the board. At that point, Mr. Ryder, who up till then had been optimistic about the Franks board's willingness to hear the grievance, began to be concerned at how seriously the company's objection was being taken.

16. The company made a proposal to the effect that it would pay Mrs. Gronka \$2,000.00 and reinstate her to employment to settle the grievance. Its counsel made it clear that the company was willing to improve this offer, but only if there was some hope that the complainant would accept it. Mr. Urbain then discussed with Mrs. Gronka and Mr. Gronka in great detail two risks that he perceived in this situation. The first one was that the union might lose on the jurisdictional issue. The second one was that even if the arbitration board heard the merits of Mrs. Gronka's grievance, it might still uphold the discharge. He made it clear that both were very serious risks and that Mrs. Gronka might come out with nothing. Mr. Gronka indicated that there was still not enough money coming from the company to persuade them to settle, and Mrs. Gronka said that she would accept \$12,000 to \$14,000 together with reinstatement to resolve her grievance.

17. The Franks board then decided that it would have to ascertain what had occurred on April 15th to determine whether the grievance or the referral to arbitration had been withdrawn. However, rather than hearing evidence in this regard, the board encouraged both counsel to consult with Ms. Kirkwood with respect to her notes of what had occurred at the hearing of April 15th. Another hearing date of March 4th was set. Subsequently, Mr. Ryder also wrote to the Office of Arbitration for any information that might be contained in its files in this regard.

18. In the meantime, Jean-Guy Belanger, president and administrator of the union, and Mr. Urbain met with the company's general manager. The latter proposed to settle the matter by paying Mrs. Gronka \$8,000 and reinstating her with full seniority. Mr. Urbain called Mr. Ryder on February 26th to advise him accordingly. Mr. Ryder called Stewart Saxe, who works with Ms. Katz, and confirmed both the offer and that there would be no problem adjourning the March 4th date to consider the offer. He then wrote a letter to Mr. Belanger recommending the settlement in the following terms:

You have asked me for an opinion as to the acceptability of management's recent offer of settlement given the chances of success in the grievor's arbitration.

Under the settlement, the grievor would be re-instated immediately with full seniority and be given compensation of \$8,000 less normal deductions.

In my view, the acceptability of the offer should be weighed against the following factors.

1. There is a reasonable chance that the arbitration board chaired by Mr. Franks will refuse to hear the grievance. During the hearing before him on January 6, 1988, he refused to proceed without first obtaining confirmation as to the status of the section 45 application. In this respect, he urged the parties to meet with the section 45 arbitrator, Ms. Kirkwood, to review her notes to determine if the grievance or the reference to arbitration had been withdrawn.

2. Subsequently, I met Ms. Kirkwood at the Grievance Settlement Board on another case and advised her that Ms. Katz and myself required a meeting to review her notes. She was willing to hold the meeting but advised that she recollected her notes recorded a withdrawal of the grievance.

3. In addition, I obtained the record of the section 45 application from the Office Arbitration which includes Ms. Kirkwood's letter advising that the grievance was withdrawn and Mr. Pineo's letter seeking to withdraw the matter from arbitration.

4. The result, I think, is that the file from the office of arbitration is inconclusive and Mr. Franks will therefore be inclined to rely on the Kirkwood letter to the parties which, as I say, states that the grievance has been withdrawn. I am advised by the union nominee to the board that Mr. Franks is reluctant to go behind arbitrator Kirkwood's letter and, in effect, overrule her. In the circumstances, we must accept the very real possibility that arbitrator Franks will decline to hear the grievance.

5. The settlement provides a degree of vindication, plus some compensation. More important for the long term, it returns the grievor to work.

When the benefits of the settlement are measured against the distinct possibility that the Franks arbitration board will not hear her case, it is my recommendation that the settlement should be accepted.

19. Mr. Ryder also spoke directly to Mr. and Mrs. Gronka and advised them to accept the offer for two reasons: firstly, the Franks board might find it had no jurisdiction to hear the grievance and secondly, he was concerned about Mrs. Gronka's failure to mitigate her damages. As a result of the latter problem, and the likelihood of an arbitrator substituting some form of discipline for the discharge even if the discharge was not upheld, Mr. Ryder was of the view that the \$8,000

represented all or more than the complainant could hope to achieve at arbitration. Elliott Posen, Mrs. Gronka's counsel, then called Mr. Ryder and indicated that he was acting for Mrs. Gronka. Mr. Ryder described his reasons to Mr. Posen for recommending the settlement, and told him that there was no rush in terms of making a decision as the company would agree to adjourn the March 4th date.

20. Mr. Urbain also strongly recommended to Mrs. Gronka that she accept the offer. In his opinion, reinstatement was most critical for her and although she wanted more money from the company, Mr. Urbain stressed the importance of her future income. He indicated that it would be better if she was back to work as soon as possible. Over the telephone he also talked to Mr. Gronka, repeating the same things to him and reiterating the two risks that he had described on January 6th. Those were that the union might lose on the jurisdiction issue before the Franks board and that even if it was successful in that regard, it might lose on the merits. He again indicated that both were very serious risks and that Mrs. Gronka might come out with nothing. Mr. Urbain also asked Donna Mlodinski to call Mrs. Gronka to urge her to take the settlement, which according to Mrs. Gronka, Ms. Mlodinski did.

21. Mrs. Gronka called Mr. Belanger and told him that she wanted the offer set out in writing. He therefore sent her a telegram describing the company's offer. She agreed in cross-examination that she discussed the offer with Mr. Posen. Mr. Gronka testified that Mr. Posen told him and his mother that they should try and get closer to what Mrs. Gronka actually lost in wages, and that it was on the basis of that advice that they decided not to accept the offer.

22. On March 2nd, Mr. Belanger told Mr. Ryder to go ahead as Mrs. Gronka was so opposed to accepting the offer, notwithstanding the union's recommendations. Mr. Ryder then told Mr. and Mrs. Gronka that he would be going ahead because they insisted, but that he still recommended against it. Mr. Ryder also indicated this to Mr. Posen and asked him in Mrs. Gronka's best interests to recommend that she take the offer.

23. At the hearing on March 4th, the Franks board decided that it would have to hear evidence after all on the issue of whether it was the grievance or the referral to arbitration which had been withdrawn on April 15th. At that point, Ms. Katz realized that she herself would have to be a witness and would need others as well. She asked Mr. Ryder at the break if he would object to a request for an adjournment. Mr. Ryder did not object because in his view, an adjournment would have been granted anyway and he did not want to raise the ire of the arbitration board by making fruitless objections. In addition, he felt that the adjournment itself would not delay matters because the case would not have been completed on March 4th in any event and it did not affect the date on which the hearing would reconvene. April 27th and May 11th were then scheduled for the continuation of the hearing.

24. On April 26th, 1988, however, the company brought an application for judicial review to prevent the Franks board from hearing the matter on the basis that it had no jurisdiction. As a result, the union and the company agreed to adjourn the hearings scheduled for April 27th and May 11th until the application had been heard. (Mr. Posen, who represented Mrs. Gronka at an early stage in the hearing before me, agreed that the decision to cancel those hearing dates because of the judicial review application was not at issue in the complaint.) Mr. Urbain called Mrs. Gronka to tell her what had happened and to inform her of the cancelled hearing dates. Regardless of this, Mr. and Mrs. Gronka attended at the place set for the hearing on April 27th, and then went to speak to Mr. Belanger to express their concerns that the April 27th hearing date had been adjourned. They indicated that they wished to make an offer back to the hotel and as a result, Mr.

Belanger sent a letter on April 29th indicating that the union would settle the grievance for the sum of \$19,500.00 together with Mrs. Gronka's reinstatement.

25. On June 27th, 1988, the company's application for judicial review was heard by the Divisional Court. The parties agreed that although a decision was made on June 28th, by mistake it was never released to the parties. Between August of 1988 and December of 1988 Mr. and Mrs. Gronka called Mr. Urbain and Mr. Belanger many times. A number of the calls to Mr. Belanger were not returned. On one occasion Mr. Belanger said that the union had done all it could for them. Mr. Urbain told them that they were simply waiting for the court's decision.

26. As time went by, Mr. Urbain, Mr. Lange and Mr. Man Kee Lui all made inquiries of Mr. Pineo and Mr. Ryder with respect to why the Divisional Court decision was taking so long. Mr. Ryder told Mr. Pineo that the decision had not yet been released and that he didn't understand it. (The application had been heard on an expedited basis.) In November or December of 1988, Mr. Ryder and Ross Wells, one of his colleagues and the lawyer who had been counsel on the judicial review application, discussed what they should do. They considered making a complaint to the Chief Justice but were concerned that that might have the effect of alienating the justice who had heard the application whom they thought had not yet reached a decision. Eventually Mr. Wells decided that a "mealymouthed" letter referring to another case would be a polite way of bringing it to the presiding justice's attention. However, such a letter was never sent because by December of 1988, the Gronkas had consulted Mr. Posen again and had obtained the decision from the Divisional Court office. They then notified the union accordingly.

27. The Divisional Court had decided that once the Minister of Labour appointed Ms. Kirkwood on the section 45 application, she had exclusive jurisdiction in the matter. The Court determined that Ms. Kirkwood's letter of April 21st to Ms. Katz indicated that she had found as a fact that the grievance had been withdrawn. Consequently, the question of whether the grievance or the referral to arbitration had been withdrawn was not open for determination by the Franks board, and the Court issued an order prohibiting the Franks board from hearing and determining the grievance.

28. On December 28th, 1988 a motion for leave to appeal the Divisional Court's decision was filed. It was not pursued as the union obtained a legal opinion that it was not worth pursuing. On March 30, 1989, this complaint was filed.

29. Section 68 provides as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

30. In *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067 the Board described its approach to section 68 in the following manner:

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad faith" and "discriminatory", therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision-making

ing of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

31. The meaning of “arbitrary” in this provision was discussed at some length in *Walter Prinesdomu*, [1975] OLRB Rep. May 444:

In using the word [sic] arbitrary both the United States Supreme Court and the Legislature of this Province must have envisaged the duty constituting more than the simple castigation of subjective ill-will in that any other interpretation would render the use of this word superfluous. Thus, a well known rule of both statutory and contractual construction militates against the respondent’s particular submissions in this regard. But where does this path lead? Some insight is gained from the *Vaca* case wherein Mr. Justice White juxtaposed the word arbitrary with the word “perfunctory” and observed that a trade union, “in a non arbitrary manner [must] make decisions as to the merits of particular grievances”. It could be said that this description of the duty requires the exclusive bargaining agent to put “its mind” to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious.

26. This approach gives the word arbitrary some independent meaning beyond subjective ill-will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.

On the other hand we do not believe, at least at this time, that all mistakes and careless conduct by trade union officials fall outside the scope of section 60. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision-making was intended. Accordingly at least flagrant errors in processing grievances-errors consistent with a “non caring” attitude must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint. However, each case must be decided on its own peculiar facts and it is clear that the duty is not going to be a fertile field for the individual adversely affected by less flagrant conduct.

32. In a similar view, the Board said in *I.T.E. Industries*, [1980] OLRB Rep. July 1001:

It is clear that in order to establish a breach of section [68], a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a “flagrant error” consistent with a “non caring attitude”, or have acted in a manner that is “implausible” or “so reckless as to be unworthy of protection”. In other words, the trade union’s conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee’s concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

33. With this in mind, I now turn to the facts of this case. The first event which was alleged to be a breach of section 68 was the late referral to arbitration of the complainant’s grievance. The relevant collective agreement contains the following provisions:

14.05 STEP NO. 3

- (a) A meeting shall take place between the Union representatives who have been

involved in the prior steps and the Manager or a senior member of management who has not previously been involved in the case. At this meeting, the business representative will be present along with any management people who have been involved to give evidence as to the circumstances of the grievance. If the grievance is not then settled to the satisfaction of both parties within a period of forty-eight (48) hours, or within any longer period as may be mutually arranged at the time, at the request of either party to this Agreement, the grievance may be referred to arbitration.

- (b) If arbitration is to be invoked, the request for arbitration must be made in writing within five (5) days after the grievance has been dealt with in Step No. 3.

- 17.02 A claim by a permanent employee that he/she has been unjustly discharged from his/her employment shall be treated as a grievance if a written statement of such grievance is lodged with the Manager of the Hotel within five (5) days after the Employee ceases to work for the Employer. All preliminary steps of the grievance procedure prior to Step No. 3 will be omitted in such cases.

34. It is not necessary for me to determine the proper interpretation of Article 14.05(b), nor do I intend to do so. My task is to consider whether the union's understanding of the collective agreement and its conduct based on that understanding was so unfounded as to be arbitrary or to suggest the presence of bad faith or discrimination. In this regard, I am satisfied that it was not.

35. Article 14.05(b) on its face refers to "days" rather than "working days". In addition, there are references to "working days" elsewhere in the grievance and arbitration provisions. Both of these facts suggest that "days" in Article 14.05(b) should be interpreted as calendar days rather than working days. On the other hand, counsel for the company provided me with references to a number of arbitration cases in which the word "days" was discussed, and in some cases interpreted as "working days". In other words, the conclusion that "days" means calendar days is not necessarily self-evident and depends on the circumstances. In this case, Mr. Urbain testified that there had been a past practice between the union and the company of treating the five day period under Article 14.05(b) as referring to working days.

36. Such oral understandings are common in labour relations and as the Board noted in *John Fenwick*, (Board File No. 0570-89-U, October 20, 1989, unreported), they may not necessarily reflect the language of the collective agreement:

It is not at all clear that [the agreement] is in conflict with the collective agreement; indeed, as Mr. Fenwick acknowledged, it is really a matter of interpretation. In any event, we are reluctant to circumscribe the ability of the company and the union to enter into a practical accommodation of their interests in the course of administering the collective agreement, even if those accommodations may appear to stray considerably from its terms. It is axiomatic that parties cannot anticipate many of the contingencies which may arise during the life of a collective agreement, and the ability to fine-tune its application is a critical ingredient in the success of a collective bargaining regime. Even if the parties are virtually amending their collective agreement, we note that section 52(5) of the *Labour Relations Act* specifically allows parties to revise the terms of their contract by mutual consent.

37. Of course, there may be some risk to a party relying upon an oral understanding or practice of some kind, as this case amply illustrates. On the other hand, I am not prepared to say that relying upon past practice in these circumstances was a contravention of section 68. Indeed, if the parties to a collective agreement are not at liberty both to reach understandings with respect to its provisions and to subsequently rely on those understandings, the administration of collective agreements would be virtually impossible.

38. The events of April 15th do not suggest a different conclusion to me. It was unclear from the evidence whether the company's timeliness objection was based on the contention that there was no past practice, or that that practice should not be used to interpret the collective agreement, or that the past practice was not available in interpreting the grievance provisions of the collective agreement under section 45. That section provides in part as follows:

45.-(1) Notwithstanding the arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) Subject to subsection (3), a request under subsection (1) may be made by a party to the collective agreement in writing after the grievance procedure under the agreement has been exhausted or after thirty days have elapsed from the time at which the grievance was first brought to the attention of the other party, whichever first occurs, but no such request shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

39. Arbitral jurisprudence restricts the use of extrinsic evidence, particularly when the language of a provision is clear on its face, and it appears that this is the basis on which Ms. Kirkwood declined to hear the union's past practice evidence. Neither that decision nor Mr. Ryder's perception that she intended to uphold the company's timeliness objection suggest that the union's conduct was so grossly negligent or capricious as to be arbitrary or to demonstrate the presence of some animosity or ill-will towards the complainant. As the excerpts from Board's jurisprudence set out earlier make clear, arbitrariness must be distinguished from "mere errors in the judgment, mistakes, negligence and unbecoming laxness". In other words, the union may indeed have been incorrect in its understanding of the collective agreement without violating section 68.

40. Neither do I think it can be said that the union's initial choice of the section 45 route was unreasonable. Section 45 provides a hearing before a single arbitrator which is usually less expensive and much speedier than a hearing before a three-person board of arbitration. Indeed, the contrast between the time it took in this case for the Kirkwood hearing to begin and for the Franks hearing to commence is quite typical. In a discharge case where speed is important because the grievor is frequently without work or income and the employer may be accumulating a liability for wages, the section 45 route was a viable choice.

41. It is true, of course, that there is jurisprudence to the effect that section 44(6) cannot be used to extend the time limits under a collective agreement for referring a grievance to arbitration (see *Re Hotel Employees and Restaurant Employees' Union and Royal York Hotel* (1983) 42 O.R. (2d) 509.) However, at the time the union filed the section 45 request, it was evident from the terms of the request itself and the other evidence before me that it was working on the assumption the referral was timely. In addition, Mr. Ryder was apparently not consulted at that early stage. The Board has said in *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519 that the standard that it applies under section 68 takes into account that union affairs are conducted for the most part by lay people:

40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board

might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; see *Fisher v. Pemberton et al.* 8 D.L.R. (3d) 521 at p. 546.

42. It is not readily apparent that a layperson, even an experienced union official, would be aware of the interplay between section 45 and section 44(6), particularly in light of the fact that there appears to have been some disagreement even amongst adjudicators (see, for example, *City of Brantford* (1983) 9 LAC (3d) 289). As a result, the choice of section 45 in these circumstances cannot be considered a violation of the Act.

43. As an aside however, section 44(6) may have something useful to say about the norms of the industrial community, which is one reference point for the union's conduct. It provides as follows:

44.-(6) Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of such time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

It is apparent that the Legislature contemplated the possibility that parties to a collective agreement might not meet the deadlines contained in it from time to time and that under certain circumstances, relief from those time limits should be granted. Even if the union had simply filed the referral one day late without any extenuating circumstances, the existence of such a provision, (whether or not it applied under section 45) may reflect a recognition that such mistakes are a relatively common fact of life in labour relations. This is particularly so in the case of a discharge grievance which was filed in a timely manner but referred to arbitration one day late, an example very likely to attract the application of section 44(6) in other circumstances.

44. As a result, I conclude that the late referral under section 45 was not a breach of section 68. This leads me to the union's conduct at the April 15th hearing. By this point, the union was aware of the company's timeliness objection and its officials had to make certain strategic decisions. Their legal advisor was of the view that the arbitrator was poised to rule against the union. There is no doubt that the decision to withdraw the arbitration referral under section 45 carried with it some risks, but the alternative in the union's estimation was the almost certain defeat of the complainant's grievance. That estimation was based on the informed assessment of an experienced labour lawyer, and with the knowledge that section 44(6) was at least theoretically available to a three-person arbitration board.

45. There is no doubt that the union *intended* to withdraw only the arbitration referral, and not the grievance itself. Indeed, on the same day that Mr. Pineo wrote to the Office of Arbitration withdrawing the application under section 45, he nominated the union's board member for the three-person panel. In other words, there is no evidence that the union had simply abandoned the complainant's grievance as she seems to suspect. To the contrary, both Mr. Pineo's nomination and the subsequent efforts of the union to constitute the three-person board indicate its representatives were consistently, albeit not particularly speedily, pursuing their new strategy for getting the grievance arbitrated.

46. It is not necessary for me to grapple with the question of whether the union in fact withdrew the grievance or the arbitration referral, or the implications of the Divisional Court's decision, because I do not think it would have ultimately made much difference. The union's position

might have been marginally better if Ms. Kirkwood had found that only the referral had been withdrawn, but much of the Divisional Court's reasoning to the effect that she had disposed of a matter within her exclusive jurisdiction might still apply. Essentially, the situation was one where the union took a gamble on April 15th which involved certain inherent risks. If it had not run afoul of one of those risks, it was likely to have encountered others. The question under section 68 is whether the gamble was a reasonable one in the circumstances, and I find that it was.

47. It was evident that the complainant was suspicious of the length of time it took to constitute the three-person board. However, as noted earlier, the time taken was quite typical. Although it may seem excessive to a stranger to the process, the fact is that the delay involved was unremarkable in light of the company's objections throughout, and does not suggest any lack of interest on the union's part.

48. The complainant was also of the view that the union had not adequately informed her of the problems encountered with her grievance, and that had she been aware of them, she might have accepted the settlement the company offered at the beginning of March. This assertion is simply not borne out by the facts. The evidence before me establishes that Mr. Ryder, Mr. Urbain and Ms. Mlodinski all urged Mrs. Gronka to accept the company's offer, with Mr. Ryder and Mr. Urbain describing in detail the reasons for their recommendation and the risks involved. Mr. Ryder and Mr. Urbain also spoke to Mr. Gronka to the same effect, and Mr. Ryder discussed the matter with Mr. Posen.

49. In other words, the union made considerable efforts to fully inform the complainant of the problems associated with her grievance and to advise her to accept the company's offer. I did not find the assertions of either Mr. or Mrs. Gronka in regard to their lack of knowledge at the time the offer was made to be very convincing. Both their correspondence and their conduct, such as their request under the Freedom of Information provisions, reflect a fairly sophisticated grasp of events. If Mrs. Gronka was initially at some disadvantage with respect to her understanding of the situation, I am satisfied that by the beginning of March, and after several detailed conversations with both Mr. Ryder and Mr. Urbain, she knew quite specifically what her choices were and the strengths and weaknesses of her legal position. Most tellingly, of course, she was at that point consulting her own independent lawyer.

50. Looking at the evidence as a whole, it is clear that both Mrs. Gronka and her son were fully apprised of the situation on March 4th but chose to hold out for more money against the advice of the union and Mr. Ryder. The essence of Mrs. Gronka's complaint at this point is that had she known that subsequent events would put an end to her grievance, she would have accepted the offer. It would have been a little difficult to predict either the application for judicial review or the Divisional Court's decision. As it was, the union's advice was sound, either in light of the situation as its officials knew it at the time or in light of subsequent events. If Mrs. Gronka chose to ignore that advice, she cannot now be heard to complain that she was wrongly advised or ill-informed.

51. The complainant was also disturbed by Mr. Ryder's agreement to an adjournment on March 4th at the company's request. Mr. Ryder testified that he had no idea that the company planned to bring the judicial review application in the interim, and indeed, it is not at all clear that the company had such plans at that point in time. There is no reason to think that the request was anything other than *bona fide*, and in any event, it is not the task of the Board under section 68 to second-guess these kinds of tactical nuances. Certainly his choice was well within the range of conduct permitted by section 68.

52. Finally, I think little can be made of the delay subsequent to the Divisional Court hear-

ing. It was common ground that the Divisional Court office had failed to issue the decision, and there was no evidence to suggest that this was such a routine occurrence that the union should have anticipated or guessed as much and acted accordingly. Thus the union's counsel found themselves in the delicate position of considering how to press for a decision in light of their concerns that such pressure might jeopardize the bottom line. It is not surprising that it took them some time to consider how best to do this, and in any event it made no difference except that the decision was obtained at a later point than it might otherwise have been.

53. In summary, I conclude that the union's conduct as a whole during this unusual series of events was not arbitrary, discriminatory or indicative of bad faith. As a result, there has been no violation of section 68.

54. Two final comments are in order. The complainant subpoenaed both Jean Read, Director of the Office of Arbitration and Elizabeth Mangaoang of that Office to testify, and Mr. Gronka examined them at considerable length. It goes without saying that neither of them could have violated section 68. However, because of a number of comments made by Mr. Gronka during his examination, I find it useful to note that both gave their evidence in an open and forthright manner, and there was no evidence of any wrongdoing or impropriety on their part whatsoever. Secondly, Mr. Gronka made very lengthy oral and written submissions on the complainant's behalf. In light of my conclusions it is not necessary for me to address all of his comments. For the complainant's benefit, I wish to point out that those of his arguments which have not been specifically dealt with in this decision have been rejected.

55. This complaint is dismissed.

0768-90-U John Kohut, Complainant v. The National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada (C.A.W.-Canada) and its Local 303, Respondent v. General Motors of Canada Limited, Intervener

Duty of Fair Representation - Unfair Labour Practice - Whether complaint stating *prima facie* case - Board declining to hear complaint against company as fair representation duty imposed solely on trade union - Board declining to hear complaint against union insofar as alleged violation based on failure to represent employee in criminal proceedings - Board declining to dismiss complaint concerning union's handling of grievance and its agreement to admit criminal trial transcript as evidence at arbitration hearing

BEFORE: S. A. Tacon, Vice-Chair.

APPEARANCES: Harry Kopyto and John Kohut for the applicant; L. N. Gottheil, Robert E. Tindale, Robert J. Ryan, Pat Clancy and Richard Fleming for the respondent; E. T. McDermott, Dave Demartile and Margaret Szilassy for the intervener.

DECISION OF THE BOARD; January 7, 1991

1. As stated in the Board's decision of October 5, 1990, the hearing was to reconvene to deal with the preliminary motions of company counsel as set out in paragraphs 2 and 3 of that decision.

2. At the continuation of the hearing, the Board heard submissions from all parties with respect to the motion by company counsel that the complaint be dismissed for failure to state a *prima facie* case and, as well, with respect to part of the relief sought by the complainant. Those representations are given in summary form.

3. First, however, it is useful to set out the pleadings in their entirety, including those filed with the complaint itself and an undated letter from the complainant's counsel, received by the Board on July 20, 1990.

4. FORM 58

On or about "March 28, 1986 to the present" the grievor(s) was (were) dealt with by "various agents" of the respondent contrary to the provisions of section(s) "68" of the *Labour Relations Act* in that he did on his own behalf or on behalf of the respondent: "inadequately represent the complainant throughout the grievance process as described in Schedule "A" attached hereto."

[Quotation marks indicate those portions of Form 58 as completed by the complainant.]

SCHEDULE "A"

1. The Complainant states that at all relevant times, he was a Production Operator at the Scarborough Plant of General Motors Canada Limited. His seniority date was July 10, 1975.

2. Throughout his course of employment, the Complainant states that he was a strong supporter of the rights of his fellow workers. He states that from time to time, he criticized the actions and attitude of management among his fellow workers with respect to safety problems and safety issues, supported initiatives of his fellow workers to advance their interests and otherwise became generally know [sic] among his fellow workers as well as by management as a committed trade unionist.

3. The Complainant states that for this reason, management had the motive to terminate his employment thereby terminating his influence and his outspokenness.

4. The Complainant states that on previous occasions during the term of his employment, the Complainant was the subject of disciplinary proceedings initiated by management out of animus against him. He states that such disciplinary actions have included efforts to terminate his employment in the past. The Complainant states that he was able on each occasion to block his dismissal and retain his employment.

5. On or about the 28th day of March 1986, the Complainant was the subject of an unlawful search and seizure of his motor vehicle which was at all relevant times parked in the parking lot of the employer's Scarborough Plant. At that time, two members of the Metropolitan Toronto Police Force conducted an unlawful search of the aforesaid motor vehicle and seized therefrom a radio/stereo cassette player which was the property of the Complainant and which he had purchased for good consideration.

6. The Complainant states that as a result of the aforesaid incident, he was charged with a criminal offence of possession under for which he was eventually acquitted in the District Court of the Judicial District of York. The charge laid against the Complainant by the police was not laid until April 6, 1986. This was approximately seven days after he was fired from his employment by the management of General Motors Limited, the Respondent.

7. The Complainant states ostensibly that as a result of the aforesaid incident, on the 31st day of March he was discharged by General Motors of Canada Limited notwithstanding the fact that he had a good work record and was competent in performing his duties, a reputation for being a hard worker among his fellow employees, notwithstanding an indemic asthmatic condition which management was aware of at the time of its hiring of the Complainant and his frequent performance of services beyond his job description.

8. The Complainant states that in the month of April, 1986, he contacted Mr. Pat Clancy a national representative of the Canadian Auto Workers Union at the Union Hall and advised him of the circumstances and of the falsity of the charge against him and was advised by the aforesaid Pat Clancy that he would receive the assistance of the Union with respect to regaining his employment.

9. The Complainant states that Mr. Pat Clancy never contacted him with respect to this matter at any point of time thereafter except for one occasion when Mr. Clancy telephoned him from Montreal and he advised Mr. Clancy what General Motors was doing in Court. The Complainant recalls that he was advised by Mr. Clancy at that time if General Motors wishes to harass a person, they generally are successful in being able to do so. The Complainant states that he didn't hear from Mr. Clancy since that time.

10. The Complainant states that subsequently, he attended court on April 21, 1986, on May 7th, 1986, on October 27th, 1986, on May 4th 1987, on August 5th 1987 and August 6th 1987 with respect to responding to the trumped up charge against him. He states that on each occasion representatives of General Motors of Canada Limited appeared in court, but the representatives of the Respondent Union at no time appeared on his behalf to encourage him or advise him or to act as witnesses on his behalf. The Complainant does state that on two occasions Richard Fleming, a former chairman of the Respondent, did appear at court to observe the case. The Complainant states that at that time, Mr. Fleming appeared not to be acting on behalf of the Complainant nor performing any official functions on behalf of the Complainant.

11. The Complainant states that the Respondent at no time had any of its agents or members contact him or assist him with respect to the aforesaid court proceedings or with respect to an outstanding grievance which he had filed arising from the incident which resulted in his dismissal. He states that from time to time, he contacted the Respondent by telephone; but it never initiated any telephone conversations with him or expressed any kind of support or sent observers to the court house to observe what was happening other than what is set forth herein.

12. The Complainant states that from time to time, he contacted the Respondent regarding the progress of his arbitration and he was advised that the Respondent would get back to him with respect to the arbitration date.

13. In or about the month of June 1988, the Complainant states that he saw Robert Ryan, Plant Chairman and Robert Tindale, national representative of the Canadian Auto Workers Union at the Union Hall of Local 303 on Kennedy Road which meeting occurred on or about the 13th day of June or thereabouts. The Complainant states that at that time, he was advised that arbitration was to take place on June 16th 1988. The Complainant complained about the short notice that he was receiving regarding the arbitration as it was related to an incident that took place a considerable amount of time earlier. In addition, the Complainant made it specifically clear that the Respondent should seek to have the arbitration put over until the Complainant's appeal from his initial conviction the charge registered August 6th 1987 was heard.

14. The Complainant states that at that time he was discouraged from proceeding with his appeal by Mr. Ryan and Mr. Tindale who advised him that he was wasting his money and that he would not win the case. He was further advised by Mr. Ryan and Mr. Tindale that as of June 13th 1988, General Motors would incur no liability in the event that he was reinstated by the arbitrator and that the Union had confirmed that they had agreed to such an arrangement (without prior agreement).

15. In the course of the aforesaid conversation, the Complainant was further advised that as a result of the arbitration, the Complainant might be able to be reinstated but he would not be able to receive any compensation for lost earnings.

16. The Complainant states that no representatives of the Respondent assisted him financially or otherwise with respect to his appeal which was heard in December, 1988 from his conviction of possession of the aforesaid radio and that the appeal was successful.

17. The Complainant states further that he advised the Union of the results of the appeal but that the Union refused to take any action or assist him in any respect with respect to receiving

compensation as a result of his dismissal by management of General Motors of Canada Limited for the incident involving the radio.

18. On April 3rd 1989, Robert Tindale who was at that time the representative of the Canadian Auto Workers Canada contacted the Complainant to advise him that his arbitration case was scheduled for April 26th 1989 and that he wished to meet with him on April 6th 1989. On April 4th 1989 Mr. Tindale advised the Complainant that the arbitration case would proceed on April 12th and still wished to see him in the Union Hall on April 6th 1989. The Complainant states that he met with Mr. Ryan and Mr. Tindale but they appeared very negative about his case, indicated that it would only be through luck that he would be able to be reinstated, that he would under no conditions receive compensation and he was generally discouraged from anticipating success at the arbitration hearing.

19. On April 11th 1989 the Complainant met Mr. Ryan and Mr. Tindale again at the Union Hall for Local 303 with Committeeman Roger Kennedy and a witness, Steve Blanchard, present. At that time, the Complainant asked Mr. Tindale to have the arbitration hearing adjourned because of inadequacy of time available for preparation. He indicated that he wished to submit evidence and witnesses and that he wished to obtain legal advice [sic] from another source. Mr. Tindale indicated that his willingness to represent the claimant on the case on the condition that the complainant agree to have the case on the scheduled date. Subsequently, and without sufficient cause, he withdrew from appearing on behalf of the complainant and advised the complainant to obtain his own counsel. In the course of the discussion, Mr. Tindale eventually agreed to obtain a remand of the case for the complainant.

20. On or about the 3rd day of May 1989 Mr. Tindale of the Respondent indicated that the company wished to confirm the date for the resumption of the arbitration on June 22nd 1989 or August 30th 1989 and that in the event that one of these dates were not confirmed by May 12th 1989, the Complainant's right to arbitration would be terminated. By letter sent to Robert Tindale dated May 8th 1989 the Complainant selected the date of August 30th 1989 for arbitration.

21. On August 30th 1989, General Motors indicated through its representative that the Respondent had agreed to permit the written transcript from the trial which resulted in the initial conviction of the Complainant on the charge of possession of stolen goods to be produced and relied on at the arbitration hearing. The Complainant argued through his lawyer that the aforesaid transcripts were inadmissible because of the arrest, search and seizure which resulted in the allegedly stolen good being detected was unlawful, and that the conviction was overruled, thereby invalidating the evidence upon which it was based. The arbitrator determined that the transcripts were admissible because of the agreement of the Respondent which was obtained without the knowledge or consent of the Complainant.

22. The Complainant states that the arbitration continued throughout the day and that the evidence obtained from the transcripts as well as the transcripts themselves were used in order to resolve the fundamental issues against his interests. The complainant stated that but for the introduction of the transcripts and their unlawful use, resulting from the unauthorized agreement of the Respondent to permit their use, the issues at the arbitration hearing would have been resolved in his favour.

23. The Complainant states that the conduct of the Respondent as described herein in conducting his arbitration violated the aforesaid section of the Labour Relations Act and that he is entitled to the relief claimed.

5. Letter Received from Complainant's Representative on July 24, 1990.

RE: John Kohut, and The National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada (C.A.W. - Canada) and its Local 303 (Sec. 89, re: *Complainant*).

We wish to advise you that in addition to the particulars relied upon in the complaint filed in the matter, Mr. Kohut will also call forth evidence indicating that at the arbitration hearing that took place in this matter and which is referred to in the complaint, Mr. Robert Tindale, the person designated to represent the complainant at the arbitration hearing, stated that the appli-

cant's case could have been won by either bringing a special amendment at the first step and if the company didn't allow him, he could have brought it back to third step and won the case at that point. The import of these words was that Mr. Robert Tindale who throughout was a representative of Mr. John Kohut, had an opportunity to actually win his grievance but failed to do so. Mr. Tindale at that time indicated further that he did not take the steps indicated because he didn't "feel like playing the game."

The complainant will rely on these statements of Mr. Tindale as additional evidence of the violation of the sections of the *Labour Relations Act* referred to in the complaint and puts the Respondent on notice of this fact and of his intention to produce this evidence.

6. Counsel for the company acknowledged that, for purposes of his preliminary motions, the facts set out in the complaint must be considered true and provable. Counsel noted, however, that the Board has the discretion as to whether or not to inquire into a section 89 complaint and submitted the Board should decline to conduct such an inquiry if no *prima facie* case had been stated. The various paragraphs of the complaint were reviewed as well as the July letter from the complainant's representative. With respect to the paragraphs alleging misconduct by the company, counsel argued that could not constitute a contravention of section 68 which section imposed an obligation solely on a trade union, and, in any event, those allegations were devoid of particulars. As to the allegations regarding the union's alleged failure to assist or support the complainant in connection with the proceedings in the criminal courts, it was contended that there was no section 68 obligation with respect to such matters. With regard to the union's handling of the complainant's discharge grievance, counsel made several submissions. Those allegations which concerned matters such as the purported failure to return calls or maintain frequent contact were answered by the fact that the grievance did proceed up to and including arbitration. Counsel contended that, far from violating section 68, the union had acceded to the complainant's repeated requests for adjournments, for his own counsel, etc. Counsel suggested, with regard to the assertion that the union told the complainant that only reinstatement, not compensation, might be available at arbitration, that the Board take judicial notice that it was not unusual for adjournments where there was continuing liability to contain such a condition for the company's consent. Counsel stressed that the arbitration award had dismissed the grievance, yet the complainant had not requested that the union seek judicial review of that decision. As well, it was submitted that the loss at arbitration rendered any alleged technical violations in processing the grievance irrelevant. With respect to the admission of the transcript at arbitration, counsel argued that the Arbitration Board had the authority to admit such a document and that arbitration award had not been challenged. Thus, that issue could not constitute a contravention of section 68. As to the relief requested, counsel submitted that the company could not be in contravention of section 68 and, thus, should not be added as a respondent. Item 4 of the relief sought (see paragraph 4 of the Board's decision of October 5, 1990) should be struck. Counsel argued, with regard to item 3 of the relief sought, that the Board had no jurisdiction to restrain the Arbitration Board from admitting the transcripts of these criminal proceedings. Finally, counsel noted that, in exceptional cases, the Board has directed the union to proceed to arbitration with a grievance and to provide independent legal counsel for the grievor. In the instant case, it was submitted, the complainant had already been to arbitration represented by counsel of his own choosing and had lost on the merits.

7. Counsel for the union adopted the remarks of company counsel and noted, in addition to the Board's statutory discretion to decline to entertain a complaint, Rule 71 of the Rules of Procedure dealing with failure to state a *prima facie* case. Counsel expanded somewhat on the earlier submissions by company counsel regarding the duty of fair representation as not extending to representation or assistance in connection with criminal proceedings. In support of these propositions, counsel cited *Luis Lopez*, [1989] OLRB Rep. May 464; *Michael Connolly*, [1987] OLRB Rep. Feb. 193; *Sylvia Colalillo*, [1982] OLRB Rep. July 1066; *Angelo Moro*, [1983] OLRB Rep. Aug. 1354. With respect to the allegation in paragraph 9 against P. Clancy, counsel contended that, even

if assumed true, there was no rational connection between that allegation and the ultimate disposition of the grievance. As to the “transcript” issue, counsel adopted the submissions of company counsel. In commenting on the relief requested, counsel submitted that the Board had no jurisdiction to order an arbitrator to exclude the transcripts from evidence as that question was properly for the arbitrator alone. It was contended that a company could not violate section 68 and, further, there was no basis for the allegation of collusion between the union and the company. As to the requested reinstatement directly by the Board, counsel noted that such an approach had been rejected by the Board in its jurisprudence but that could be dealt with in submissions on the merits if such were necessary.

8. The complainant’s representative conceded that the Board had the authority to dismiss a complaint for failing to disclose a *prima facie* case but submitted that it should only be done in the clearest of cases. The appropriate test in such matters was whether the complainant had an arguable case for at least some of the relief claimed and, in the instant case, that standard was satisfied. The complainant’s representative stated that he was not suggesting that, on its own, the alleged conduct of the union in connection with the criminal proceedings contravened the section 68 duty but, rather, that that conduct could be relied on to establish bad faith in regard to the grievance and arbitration process. In particular, it was suggested that the union could have mobilized the bargaining unit members to show their solidarity where a fellow employee had been falsely accused. The allegations against the company (paragraphs 1 - 4 in the pleadings in particular) were relevant, it was submitted, to establish the company’s efforts to terminate the complainant in the past which were ostensibly blocked by the complainant and the union. That evidence, it was argued, could play some role in determining what position the union might have taken in the complainant’s defence. The complainant’s representative contended that paragraphs 21 and 22 of the pleadings were critical to the complaint impugning the union’s agreement to admit the transcripts as arbitrary, discriminatory or in bad faith. In this regard, the complainant’s representative stressed that the pleadings must be assumed true and provable and, hence, it must be accepted, for purposes of the preliminary motion, that the arbitration would have vindicated the complainant “but for” the introduction of the transcript and the transcript would not have been admitted “but for” the union’s agreement. It was submitted that the alleged collusion between the company and the union rendered it appropriate to make the company a party respondent for purposes of the relief sought. The allegations in the July letter against R. Tindale, it was asserted, squarely raised the issue of bad faith in the union’s handling of the grievance process. With respect to the question of judicial review of the arbitration award, the complainant’s representative argued that failure to challenge the award was irrelevant as the impugned conduct was not the arbitration itself but the union’s agreement, without the complainant’s consent, to admit the transcript. As well, the fact that the complainant was represented by counsel of his choosing at the arbitration was not relevant to the *prima facie* case issue as his counsel had been bound by the union’s agreement to admit the transcript. It was submitted that the pleadings made out a *prima facie* case that the union was uncaring in its attitude toward the complainant throughout the criminal proceedings and the grievance process and consistently were negative about his prospects in both forums. Further, it was argued that the purported agreement to abandon retroactive compensation without the complainant’s consent to obtain the adjournment the complainant sought raised an arguable breach of section 68. In short, the complainant’s representative argued that a *prima facie* case had been made out and, further, the question of the relief sought should not be canvassed at this point.

9. In reply, union counsel emphasized that the complainant was bound by his pleadings and could not now seek to amend those pleadings, particularly with regard to any assertion that R. Tindale’s withdrawal from the grievance contravened section 68. Counsel rejected the proposition by the complainant’s representative that the union’s alleged conduct in connection with the criminal proceedings could constitute evidence of bad faith where there was no duty to represent the

complainant in that forum. It was stressed that the pleadings did not suggest the union had so assisted others and, thus, its failure to do so for the complainant violated section 68. With regard to the assertion that “but for” the introduction of the transcript, the complainant would have succeeded at arbitration and the allegation in the July letter from the complainant’s representative, counsel argued that, even at a *prima facie* level, the allegations should not be so unreasonable as to cause unnecessary litigation. That is, the assumption that the pleadings are assumed true and provable should be subject to some limitations of reasonableness or, at least, that the pleadings not be so improbable as to generate frivolous or vexatious litigation.

10. In reply, counsel for the company asserted that, where the complainant had his case adjudicated at arbitration and had independent legal representation, more than vague hints or assertions of bad faith were required. It was argued that the wording of paragraphs 21 and 22 of the pleadings did not amount to a clear assertion that “but for” the introduction of the transcript, the complainant would have been successful at arbitration. Further, the allegation was that the complainant argued against the admissibility of the transcript (and lost on that point). The complainant did not assert that the union’s agreement to admit the transcript was improper and cannot now alter his pleadings. Counsel recognized that it was unusual to dismiss a complaint for not making out a *prima facie* case but submitted that it was appropriate to do so in the instant case where the complainant had had his arbitration and was there represented by his own counsel and lost.

11. The Board categorizes the pleadings and allegations as falling under three headings: those directed against the company; those directed against the union in connection with the criminal proceedings; those directed against the union in connection with the arbitration process. The Board intends to consider each in turn and, finally, deal with the question of the relief sought in the context of the preliminary motions.

12. Union counsel generally agreed that, for purposes of the company’s preliminary motion that the complaint did not disclose a *prima facie* case, the Board assumes the pleadings are true and could be proved at a hearing but asserted that some limit of reasonableness in making those assumptions was needed to preclude unnecessary litigation because of pleadings which were so far-fetched as to be vexatious or frivolous. The Board is not unsympathetic to this position and it may well be that some limits do exist even in the context of a “no *prima facie* case” argument where the pleadings are inconsistent with facts of which a board would take “judicial notice”. However, while the pleadings in the instant case may well be difficult to establish on the evidence as matters of fact, they are not so improbable as to warrant departure from the Board’s usual approach of assuming the pleadings to be true and provable. The Board agrees with the characterization of its assessment as to whether a *prima facie* case exists as delicate (see *Michael Connelly*, supra,) but affirms the test to be applied herein is whether the pleadings, when assumed true and provable, could sustain an arguable case for violation sections of the Act alleged or for the remedy requested.

13. The Board need only deal briefly with the impugned conduct of the company. Section 68 reads as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

It is evident from perusal of the statutory language that the duty of fair representation is imposed solely upon trade unions and, hence, employers cannot be in violation of section 68. Alleging col-

clusion between the company and the union cannot serve to alter the statutory wording to extend a section 68 duty to the company. The complaint has asserted a violation of section 68 alone and must be held to those pleadings at this juncture. As the company cannot be found to have violated section 68, the pleadings with respect to the impugned conduct of the company do not disclose an arguable case for breach of the Act. Accordingly, the Board exercises its discretion in section 89 of the Act to decline to hear the complaint insofar as it relates to alleged improprieties by the company.

14. The Board next turns to those pleadings concerning the union's alleged conduct with regard to proceedings in the criminal courts in which the complainant was involved. It is useful to refer to the analysis in *Luis Lopez*, supra, in the following somewhat lengthy passage:

11. The issue squarely raised in these proceedings is the ambit of the obligation imposed by section 68 of the Act. Is the trade union obliged to represent bargaining unit employees in connection with WCAT proceedings in the sense that a specific decision not to so represent the complainant in the instant case is subject to scrutiny by the Board to ensure that that decision was not arbitrary, discriminatory or in bad faith? Further, is it relevant to the analysis that the union did represent the complainant before the WCB?

12. It is appropriate to first reflect on the history and purpose of section 68 of the Act which reads:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

While the section is couched in broad terms ("shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit"), the Board regards the duty of fair representation as restricted so that the extent of the duty is coextensive with the extent of the union's authority as exclusive bargaining agent. The duty of fair representation was enacted as a counterweight to the restrictions on individual employee rights inherent in the creation of a collective bargaining regime in which the bargaining agent was granted exclusive rights to bargain on behalf of all employees in the bargaining unit, whether or not union members. The duty of fair representation serves to protect the individual from decisions of the bargaining agent which could be characterized as arbitrary, discriminatory or in bad faith. In effect, given that the trade union would likely be more responsive to the wishes of the majority, the individual was afforded some protection against the "tyranny of the majority" since the advent of a collective bargaining regime had, for all intents and purposes, eliminated the individual's common law right to negotiate an individual contract of employment. Thus, the context in which the section 68 duty arises and its purpose constitute the rationale for defining the ambit of the trade union's statutory obligation to fairly represent the employees in the bargaining unit.

13. In elaborating on the Board's conclusion, it is useful to briefly sketch the American jurisprudence dealing with the duty of fair representation which arises in a judicial context in that jurisdiction but which was influential in the adoption here of a statutory duty of fairness. The duty developed through a series of cases including *Steele v. Louisville & National Railroad*, 15 LRRM 708 (1944); *Tunstall v. Locomotive Firemen*, 15 LRRM 715 (1944); *Wallace Corp. v. NLRB*, 15 LRRM 697 (1944); *Humphrey v. Moore*, 55 LRRM 2031 (1964); *Ford Motor Co., v. Huffman*, 31 LRRM 2548 (1953). The far-reaching decision in *Vaca v. Sipes*, 64 LRRM 2369

(1967) firmly established the duty of fair representation as an obligation imposed on an exclusive bargaining agent with respect to representation of employees in the bargaining unit both in collective bargaining and in the enforcement of a collective agreement. While the focus of the jurisprudence prior to and since *Vaca v. Sipes* was on the quality of representation and the appropriate standard for evaluation of the representation afforded to an individual bargaining unit member, a common theme in the cases links the issue of the duty of fair representation to the employer's conduct in that the remedy for breach may well run to both the union and the employer.

14. A few cases have commented more directly on the ambit of the duty rather than solely on its content. In *Hines v. Anchor Motor Freight, Inc.*, 91 LRRM 2481 (1976), Mr. Justice White, for the U. S. Supreme Court, stated (at 2484):

Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of the individual employee to the collective interests of all employees in a bargaining unit," *Vaca v. Sipes*, 386 U.S. 171, 182, 64 LRRM 2369 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, "the responsibility and duty of fair representation" *Humphrey v. Moore, supra*, at 342, 55 LRRM at 2034.

The self-limiting reach of the duty was expressed thus in *Freeman v. Teamsters, Local 135*, 117 LRRM 2873 (C.A. 7, 1984) at 2875:

A union's statutory duty of fair representation is coextensive with its authority under s 9(a) of the National Labour Relations Act, 29 U.S.C. s 159(a), to act as the exclusive representative for the members of the collective bargaining unit. *Schneider Moving & Storage, Co. v. Robbins*, 104 S.Ct. 1844, 1851 n.22, 101 LRRM 2365; *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 46 n.8, 101 LRRM 2365; *Kolinske v. Lubbers*, 712 F.2d 471, 481, 113 LRRM 2957 (D.C. Cir. 1983). The scope of the duty of fair representation, however, extends no further. If a union does not serve as the exclusive agent for the members of the bargaining unit with respect to a particular matter, there is no corresponding duty of fair representation. *Dycus v. NLRB*, 615 F.2d 820, 827, 103 LRRM 2686 (9th Cir. 1980); *Kuhn v. National Ass'n of Letter Carriers, Branch 5*, 528 F.2d 767, 770, 91 LRRM 2177 (8th Cir. 1976). "[A] union ... can be held to represent employees unfairly only in regard to those matters as to which it represents them at all - namely, 'rates of pay, wages, hours ... or other conditions of employment.'" *International Brotherhood of Teamsters, Local No. 310 v. NLRB*, 587 F. 2d 1176, 1183, 98 LRRM 3186 (D.C. Cir. 1978) (quoting 29 U.S.C. s159(a)).

The rationale that the union's obligation to represent is necessarily limited to the arena circumscribed by the collective agreement for the reason that that arena defines the scope of the union's exclusive authority to act for its members is echoed in other Court of Appeals decisions including: *Bass v. Boilermakers, Local 582*, 105 LRRM 3258 (1980); *Smith v. Local No. 25, Sheet Metal Workers*, 87 LRRM 2211 (1974); *Kolinske v. Lubbers*, 113 LRRM 2966 (1983); *International Brotherhood of Teamsters, Local No. 310 v. NLRB*, 98 LRRM 3186 (1978); *Price v. The Automobile Workers*, 122 LRRM 3130 (C.A. 2, 1986).

15. These just-noted cases have arisen in the context of the courts' refusal to extend the duty to internal union affairs, subject to circumstances wherein the internal policies and practices have a substantial impact on members' rights relating to the negotiation and administration of a collective agreement: *Retana v. Elevator Operators*

Union, 79 LRRM 2272 (1972). Less frequent are cases involving the attempted application of the duty of fair representation to obligate the union in respect to matters external to the union and the collective bargaining relationship: *Hawkins v. Babcock & Wilcox Co.*, 105 LRRM 3438 (1980); *Eason v. Frontier Airlines*, 106 LRRM 2268 (C.A. 10, 1981). The latter case, *Eason v. Frontier Airlines*, concerned an allegation that the union had breached its duty of fair representation by refusing to process a grievance, arising from a workplace injury, against the employer. The Colorado workers' compensation legislation precluded an action against the employer. For this reason, the court stated the grievance would accomplish nothing and commented that the:

...plaintiff may not convert a claim for personal injury in the course of employment to a claim against the union for unfair representation. We agree with the trial court that it would be anomalous to expose the Union to a claim for that inquiry when Colorado law provides an exclusive remedy for the injury.

This conclusion assumes that the duty of fair representation is confined to the collective bargaining process and recognizes that the absence of a remedy beyond that provided by workers' compensation legislation renders the representation issue moot.

16. Thus, the American jurisprudence has recognized, generally by implication but on occasion expressly, that the duty of fair representation reaches only as far as the scope of the union's role as exclusive bargaining agent in the context of collective bargaining matters.

17. The Board's elaboration of the content of the duty of fair representation has drawn on the American jurisprudence. The decisions have focused on the quality of representation afforded the individual bargaining unit member but implicit in the leading decisions is the confinement of the duty to matters arising out of the collective agreement and/or the collective bargaining relationship with the employer, that is, the areas wherein the *Labour Relations Act* confers exclusive authority on the union: *Donald G. Gebbie*, [1973] OLRB Rep. Oct. 519; *Walter Princesdomu*, [1975] OLRB Rep. May 444; *Myrna Wood*, [1981] OLRB Rep. Feb. 137; *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. July 418.

18. The ambit of the section 68 duty rather than its content has been briefly addressed in the context of complaints concerned with internal union affairs. The Board has consistently refused to extend the section 68 duty into matters properly characterized as internal union affairs because representational rights with respect to an employer are not involved: *Arthur Joseph Roberts*, [1974] OLRB Rep. Mar. 169; *Mario Moreira*, [1980] OLRB Rep. July 1079; *Frank Manoni*, [1981] OLRB Rep. Dec. 1775; *Sylvia Colalillo*, [1982] OLRB Rep. July 1066; *Angelo Moro*, [1983] OLRB Rep. Aug. 1354; *Michael Connolly*, [1987] OLRB Rep. Feb. 193; *Ronald Lewzoniuk*, [1984] OLRB Rep. Jan. 48; except where the union's conduct pursuant to its usual practice has a direct impact on the right of an employee to grieve (*R.C.A. Limited, Prescott*, [1974] OLRB Rep. Jan. 60). It is useful to set out the following passage from *Sylvia Colalillo*, *supra*, which briefly reviews the Board's reasoning in this area:

3. ... The dispute was solely between the complainant and her trade union, and this is the primary problem which the complainant is faced with in these proceedings. The real issue between the complainant and the respondent is the complainant's eligibility to run for the Union position of steward, and the employer understandably has taken no position on that matter. The duty of fair representation in section 68 on the other hand, is concerned only with

the representation by a trade union of an employee *vis-a-vis his or her employer*. See *Ford Motor Company*, [1973] OLRB Rep. Oct. 519; *Myrna Wood*, [1981] OLRB Rep. Feb. 137; *Frank Manoni*, [1981] OLRB Rep. Dec. 1775; *Sofiley Cartage*, Board File No. 1347-81-U, released May 26, 1982. It is only because the employee's normal rights to deal directly with the employer are circumscribed by collective-bargaining law that the duty of fair representation arises. As the Board stated in *Frank Manoni*, *supra*, at paragraph 11:

...The arbitrary, discriminatory or bad faith conduct, directed at such employees and regulated by the section must be such as to produce actual, and not merely speculative prejudice to those employees at the *hands of their employer*.

As the Board also noted in *Mario Moreira*, [1980] OLRB Rep. July 1039:

...this Board has no specific authority under the Act to undertake any sort of watchdog role over a union's internal processes under its constitution and by-laws.

And also in *Arthur Joseph Roberts*, [1984] OLRB Rep. March 169 the Board stated:

8....the duty of fair representation owed by a trade union to an employee under section 60 [now section 68] of the Act does not contemplate controlling the manner in which a trade union conducts its affairs with its elected officials whether they be on the payroll or not. The case law indicates that the propriety of a trade union's behaviour *vis a vis* its members is governed by its constitution and by-laws and the procedural remedies provided therein. And recourse must be made by an aggrieved member to the governing rules provided under the constitution for relief. The safeguard provided by the controlling supervision of the courts are his assurance that these rules will be implemented fairly and impartially. (See *White v. Kuzych* (1951), A.C. 585; *Lee v. Showmans Guild* (1952), All. E. R. 1175; *Orchard v. Tunney* (1957), S.C.R. 436; 8 D.L.R. 273; *Jurak et al v. Cunningham* (No. 1) (1959), 20 D.L.R. (2d) 377; *Jurak et al v. Cunningham* (No. 2) (1959), 20 D.L.R. (2d) 381; *Gee v. Freeman et al* (1958), 26 W.W.R. 546).

4. The only aspect of the present complaint touching upon the employment relationship as such is the fact that the collective agreement does provide a kind of super-seniority for area stewards in the event of lay-off and the complainant points out that had she been permitted to run for election, she might today be still employed in the plant in the place of the incumbent area steward. This, however, is obviously not the basic reason why stewards are provided for, and the complainant does not put this consideration forward as a significant element of motivation either on her part, in seeking the nomination, or, more importantly, of the respondent in denying her that status. The matter of super-seniority was, the complainant concedes, not even raised with the respondent at any time prior to the filing of this complainant [sic]. It is, in other words, an issue wholly incidental to the real dispute which arose between the parties, being the matter of eligibility for internal trade union elections, and is not sufficient to clothe the Board with jurisdiction.

19. Beyond the cases dealing with internal union affairs, few decisions expressly consider the reach of the duty of fair representation. In *Percy Woods*, [1972] OLRB Rep. Apr. 353, the complainant alleged a breach of the section 68 duty, *inter alia*, in the union's refusal to pursue a further appeal of a WCB claim wherein the union had represented the complainant at the earlier stages in the process. The Board, assumed without deciding that the duty of fair representation extended to such instances and dismissed this aspect of the complaint on the basis that the union's conduct was not arbitrary, discriminatory or in bad faith. In *James Richard Hughes*, [1986] OLRB Rep. Jan. 103, the Board commented that "it is not at all clear that the duty would extend to ESB [Employment Standard Branch] meetings" (at paragraph 26) but did not have to resolve that issue in dismissing the complaint. The decision in *Betty Lavoie*, *supra*, wherein the Board refused to apply the section 68 duty to the context of civil proceedings merits further comment. In the Board's view, the union had neither the right nor the obligation to represent or fund an employee in collateral civil proceedings related to the termination of the complainant's employment:

13. It was suggested in particular, that the union should provide the funds, and absorb the costs, if the grievor commences a civil action in the Courts against her former employer. There are several difficulties with this proposition. In the first place, as we have already noted, there is no evidence that this suggestion was ever made to the union, and it is a little difficult to find that the union has broken the law by refusing to volunteer. More fundamentally, a civil action involves the assertion of common law rights which are personal to the grievor, and entirely remote from the sphere of collective bargaining in which the union operates and to which section 60 was intended to apply. Within the collective bargaining realm, the trade union is, by statute, the employee's exclusive bargaining agent, and an employee is unable to bargain on his own behalf or even act unilaterally to assert his rights under a collective agreement. In this context, it is easy to understand why the Legislature would impose upon the union a statutory obligation to act fairly. But the trade union has no right to bring a civil action on behalf of an employee, and could not be a party to that proceeding. A civil action has nothing to do with the employee's collective bargaining rights either directly or indirectly. Since a common law Court (unlike an arbitrator) cannot order the employee reinstated, the grievor's connection with her employer, the bargaining unit, and her union has now been permanently severed. Her sole remedy is in terms of damages *if* she is able to prove, contrary to her employer's assertion, that her absenteeism did not justify her termination. It is one thing to assert that a union must act fairly within the context of collective bargaining; it is quite another to suggest that the union has an obligation in respect of the personal, civil or common law rights of a former bargaining unit employee. We do not think that section 60 was ever intended to extend that far or that the union could be breaching its obligation as bargaining agent by failing to fund a collateral civil action.

See also: *Registered Psychiatric Nurses' Association of British Columbia*, *supra*, wherein the B.C. Board, in part, held that the union was not required to represent bargaining unit employees at proceedings such as inquests which are outside the realm of the administration of collective agreements.

20. The Board regards the analysis in *Betty Lavoie*, *supra*, as applicable to other matters outside the reach of the union's statutory exclusivity as bargaining agent, such as the instant case involving representation at WCB and the WCAT proceedings. Delimiting the scope of the duty of fair representation to areas encompassed by the negotiation and administration of the collective agreement is grounded on the historical

context in which the duty arose and the purpose and context of the duty as expressed in the Board's jurisprudence. The development of the American case law since *Vaca v. Sipes*, *supra*, indicates the thrust of the cases is to confine the duty of fair representation to the arena of collective bargaining and collective agreement administration. The Board case law, while not expressly imposing such a limitation, implicitly acknowledges those parameters as well.

21. The issue of the ambit of the union's obligation under section 68 is squarely raised in the instant case. The Board concludes, for the reasons already expressed, that the duty of fair representation must be commensurate with the reach of the union's statutory authority to represent the employees in the bargaining unit. Although, in a sense, the WCB intimately affects the relationship of employer and employee, the relevant statute, the *Workers' Compensation Act*, R.S.O. 1980, c. 539 (as am) effectively removes the adjustment of compensation for work-related injuries from the collective agreement arena by interposing an administrative agency between the worker and the employer. All claims for compensation are to be heard and determined by the WCB and, once compensation is awarded, it is paid out of an accident fund in accordance with a pre-determined scale. The trade union has no statutory role in the scheme. Hence, the union's representational duty in section 68 of the *Labour Relations Act* as exclusive bargaining agent is unrelated to the statutory scheme for workers' compensation and cannot apply to such claims: see *Eason v. Frontier Airlines*, *supra*, to the same effect. Accordingly, the Board finds that the union's decision not to represent the complainant at the WCAT proceeding falls outside the scope of the section 68 duty. Its decision in that regard may not scrutinized by the Board by virtue of the duty of fair representation.

22. The fact that the WCB process has an "employment" aspect is insufficient to clothe the Board with jurisdiction under section 68. This conclusion echoes the reasoning in *Sylvia Colalillo*, *supra*, at paragraph 4 of that decision (set out at paragraph 18 above). The B.C. Board's comment in *Registered Psychiatric Nurses' Association*, *supra*, at 459 is particularly apposite in this regard:

The next branch of Morgan's complaint is the Union's failure to represent him at the coroner's inquest. The Association has argued that they were under no further duty to Morgan at this point in time since he had resigned and was no longer a member of the bargaining unit. We cannot accept this proposition. Had Morgan been discharged and a grievance sustained on arbitration, reinstatement would have restored his bargaining unit status at the time of the inquest. Similarly, had the Association's representation of him before or throughout the Hall incident been in breach of Section 7(1), and a subsequent arbitration resulted in Morgan's reinstatement, the same result would have occurred. Notwithstanding this, however, we are of the opinion that the Association had no obligation under the Code to represent Morgan at the inquest.

The inquest was not a proceeding under the collective agreement; it was an outside proceeding. Where Section 7(1) speaks to "representation", it must be taken to mean representation in the negotiation or administration of collective agreements. Disciplinary matters and grievances come within the purview of the duty. Inquests do not. It is not enough that the outcome of the inquest might influence Morgan's employment rights. The same could be said of criminal charges, theft from an employer for example. While Section 7(1) would require fair representation of an employee discharged as a result of such a theft, it would not require the union to represent him in criminal court. A union may choose to provide representation to its member at outside proceedings such as inquests or criminal proceedings arising out

of incidents during strikes, but their failure to do so is not a matter which may be a breach of the duty of fair representation.

23. Given the Board's finding that the instant complaint falls outside the ambit of section 68, the complaint cannot be said to disclose a *prima facie* case for breach of section 68: *Angelo Moro, supra*; *Ken Johnson*, [1980] OLRB Rep. Jan. 113; *Ronald Lewzoniuk, supra*. The objection of the respondent on this ground is upheld as well. Quite simply, the union had no obligation, pursuant to section 68, to represent the complainant at the WCB level or thereafter. The commencement of other legal proceedings seeking to challenge the WCB disclosure of the medical records on the grounds that such disclosure violated the complainant's *Charter* rights likewise falls outside the scope of the duty of fair representation. Indeed, to the extent those legal proceedings are to be initiated in the courts, the reasoning in *Betty Lavoie, supra*, is directly applicable: see, too, *Ronald Lewzoniuk, supra*. Consequently, this aspect of the complaint fails to disclose a *prima facie* for breach of section 68.

24. The Board's conclusion is not affected by the fact that the union initially represented the complainant before the WCB. That is, representation which arises outside the union's role as exclusive bargaining agent cannot generate a duty to represent pursuant to the *Labour Relations Act*. It may be that, in another forum, the union or its officers could be compelled to continue representing the complainant (or to have initially represented him at the WCB if they had declined to do so) based on the contractual relationship between a union and its members as expressed in its constitution or arising out of its conduct: see, for example, *Orchard v. Tunney* (1957), 8 D.L.R. (2d) 273; *Astgen v. Smith*, [1969] 1 O.R. 129; *Foran v. Kottmeier*, [1973] 3 O.R. 102 (C.A.); and see paragraph 18 above. Whether or not an enforceable right may be established elsewhere, it is clear the union's conduct in representing the complainant at the WCB stage cannot subject a decision not to do so at the WCAT level to review by the Board by virtue of section 68 of the *Labour Relations Act* as such an obligation would not be coextensive with the union's exclusive bargaining authority conferred by the *Labour Relations Act* and to which section 68 scrutiny must be limited. In other words, without statutory or inherent jurisdiction to review the contractual relationship between a union and its members, as expressed in the union's constitution and bylaws, the Board cannot enforce that relationship. Nor can the Board rely on a doctrine akin to estoppel to require the union to continue its representation as a matter of equity because of the union's conduct in initially representing the complainant, when the Board lacks the jurisdiction to supervise the relationship between the union and its members beyond the confines of the collective agreement, its negotiation and administration: see *Registered Psychiatric Nurses' Association, supra*, in the passage cited in paragraph 22 above.

15. In the Board's view, the reasoning in *Luis Lopez, supra*, is applicable to the instant case. Proceedings in the criminal courts, like proceedings before the WCB or the WCAT, fall outside the ambit of the duty of fair representation imposed in section 68 since that duty must be commensurate with the reach of the union's statutory authority to represent the employees in the bargaining unit. The complainant's trial and appeal are not matters between him and the company but between him and the State, governed by statutes other than the *Labour Relations Act* and to be adjudicated by the judiciary. Accordingly, the union's representational duty in section 68 of the *Labour Relations Act* as exclusive bargaining agent does not extend to the various statutes creating criminal offences. The fact that criminal charges may be grounded in the conduct of an employee in the bargaining unit at his or her place of employment does not alter the scope of the duty of fair representation. The section 68 duty imposed on the union is solely to fairly represent the employee vis a vis the employer in connection with the alleged misconduct where that alleged misconduct is also the subject of criminal charges.

16. For the above reasons, the Board exercises its discretion to decline to hear the complaint insofar as it alleges a section 68 violation against the union in its failure to represent the complainant in connection with the complainant's criminal proceedings, as not disclosing a *prima facie* case.

17. The complainant's representative indicated that he did not directly challenge the reasoning in *Luis Lopez*, supra. The thrust of his argument was that, while the union may not have a section 68 duty to represent the complainant in connection with the criminal proceedings, the fact that they did not so represent him or otherwise demonstrate their solidarity for, or enthusiastic support of, the complainant was relevant to the allegation of bad faith and uncaring attitude in their handling of the complainant's grievance. It appears to the Board that the complainant's representative is seeking to introduce evidence of the union's conduct in connection with the complainant's involvement in the criminal process in support of the alleged section 68 violation by the union in its handling of the complainant's grievance. As noted *infra*, the Board is not prepared to dismiss the complaint at this stage with respect to the allegations regarding the processing of the grievance prior to arbitration and the union's agreement to admit the transcript of the criminal trial into evidence at the arbitration. Whether the union's conduct with respect to the complainant and the criminal process is arguably relevant to that portion of the complaint which the Board is not prepared to dismiss in the context of the preliminary motion is premature to decide at this juncture.

18. The remaining pleadings concern the processing of the grievance prior to arbitration and the union's agreement to admit the transcript of the criminal trial into evidence at arbitration. The pleadings (including the July letter) assert that the manner in which the grievance was handled and the union's agreement that the transcripts be admitted was arbitrary or in bad faith. There is nothing in the pleadings which asserts that the complainant was the subject of discrimination within the meaning of section 68 in his representation by the union throughout. As noted earlier, the appropriate standard in the context of this preliminary motion is whether the complainant has made out an arguable case on the basis that the pleadings and allegations are assumed true and provable. It may well be that the complainant cannot substantiate his allegations but the Board is not persuaded that it should exercise its discretion to dismiss the allegations, as pleaded, concerning the handling of the grievance prior to arbitration and the union's agreement to admit the transcript into evidence at this stage. The Board is not expressly finding that a *prima facie* case has been made out; it is simply that the Board declines to dismiss the complaint in its entirety as requested in the preliminary motion. The Board notes that its decision solely relies upon the pleadings as the arbitration award was not before the Board nor was any documentary material filed on consent.

19. With respect to the relief sought, insofar as the relief seeks to name the company as respondent and asserts collusion to violate section 68, that request cannot stand given the Board's earlier conclusions about the scope of section 68. Whether the Board has jurisdiction to direct the other remedies sought and/or whether such relief would be appropriate should the complaint (as it remains) be upheld on the merits is premature to determine at this point.

20. For the foregoing reasons, the Board dismisses the complaint for failure to disclose a *prima facie* case except with respect to the allegations, as pleaded, concerning the union's handling of the complainant's grievance prior to arbitration and the union's agreement to admit the transcript of the complainant's trial as evidence at the arbitration hearing. The hearing shall continue on January 30 and February 6, 1991 to deal with company counsel's remaining preliminary motion that the complaint be dismissed because of the delay in filing that complaint. Given the Board's

decision herein, it is only the complaint as it remains which is the context for the preliminary motion dealing with delay.

2164-90-FC United Food and Commercial Workers International Union, Local 175, Applicant v. Kraus Carpet Mills Limited, Respondent

First Contract Arbitration - Employer adopting uncompromising bargaining position by refusing to consider union's proposals for part-time employees' benefits - Whether employer's position without reasonable justification - Board concluding that no reasonable justification established - Settlement of first contract directed

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *J. Lear* and *C. McDonald*.

APPEARANCES: *Frank Luce, Julia Noble* and *Michael Duden* for the applicant; *Carl Peterson* and *Richard Busch* for the respondent.

DECISION OF THE BOARD; January 15, 1991

1. File No. 2164-90-FC is an application for a direction that a first collective agreement be settled by arbitration pursuant to section 40a of the *Labour Relations Act* ("the Act").

2. In a unanimous decision dated December 12, 1990 the Board issued the following ruling:

1. File No. 2164-90-FC deals with an application under section 40a of the *Labour Relations Act* for a direction that a first collective agreement be settled by arbitration.

2. Having regard to the agreed facts, evidence and submissions of the parties, the Board, pursuant to section 40a(2) of the *Labour Relations Act*, hereby directs the settlement of a first collective agreement between the applicant and the respondent by arbitration. Our reasons for this decision will issue at a later date.

Our reasons for that decision are contained herein.

3. Many of the facts in this case are not in dispute. The United Food and Commercial Workers International Union, Local 175 ("the union" or "the applicant") obtained bargaining rights for the part-time employees of Kraus Carpet Mills Limited ("the employer" or "the respondent") by way of a certificate issued by the Board on February 20, 1990. They gave notice to bargain to the employer in March and the union requested the appointment of a conciliation officer in April. The parties met and negotiated on May 30, 1990, July 4, 1990, July 18, 1990 and August 21, 1990. In addition there were relevant telephone conversations between the parties on October 17, 1990 and October 22, 1990. The parties then met one last time on October 31, 1990.

4. The Respondent employs approximately 200 full-time employees, who have been represented by the union since 1984, and 7 part-time employees who have been represented by the union since February. The negotiations for a first collective agreement for the part-time workers are the subject matter of this application.

5. By way of background information the Board also heard that Kraus Carpet has two sis-

ter companies. "Strudex", which manufactures the fibre which is incorporated in the carpet manufactured by Kraus, employs 200 full-time employees who are represented by the union and six part-time employees who are non-union. "Spinning Mills" employs 18 full-time workers who are represented by a different local of the union and does not employ any part-time workers.

6. The applicant in this case alleged a breach of section 40a and requested that the Board order the settlement of the first collective agreement by arbitration. Section 40a of the Act provides in part as follows:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

7. Section 40a sets out a series of conditions which must be met before the Board can direct the settlement of a first collective agreement by arbitration. The first of these is the requirement for the Minister to release either a notice that it is not considered advisable to appoint a conciliation board or to release the report of the conciliation board. In this case the Minister issued his decision not to appoint a board of conciliation on August 27, 1990. The second condition which must be met is contained in section 40a(2) and is that "the process of collective bargaining has been unsuccessful". This was not in dispute before us. Counsel for the respondent conceded that this condition had been met. Section 40a(2) then sets out reasons for the lack of bargaining success. The applicant did not contend that this case falls within the ambit of section 40a(2)(a), (c) or (d) but instead focused its argument on 40a(2)(b). Counsel for the employer conceded that the respondent had in fact been "uncompromising" within the meaning of section 40a(2)(b). Thus, the only issue which the Board had to decide was whether the employer had reasonable justification for its "uncompromising" position and, if not, whether the uncompromising nature of the bargaining position adopted by the respondent without reasonable justification was the cause of bargaining being unsuccessful.

8. In order to understand the justification put forward by the employer for its bargaining position, it is necessary to review some additional facts. As noted earlier, negotiations between the parties were conducted between May and October of 1990. Although the evidence called with respect to these negotiations was brief and quite sketchy, it clearly confirmed the respondent's concession that it adopted an uncompromising position with regard to the issue of benefits. In this particular case the term "benefits" refers to the Dental Plan, Pension Plan, and Health and Welfare Plan as currently in place in the full-time collective agreement. From the outset of the bargaining process which took place between the parties, the respondent refused to consider the union's request for any benefits whatsoever for the part-time employees.

9. Mr. Ron Springall, the Regional Director of the South West Region of the union was called to give evidence on behalf of the union. He testified that although his primary role was to oversee the negotiations being conducted within his region, he occasionally acted as chief spokesperson himself in some negotiations. He indicated he had been involved with the respondent since 1986. He attended the first negotiating meeting on May 30, 1990 and indicated that the union was seeking a part-time collective agreement with the same language as the full-time agreement. The benefit plan in place for the full-time employees is what is known as an "employer-union trustee plan". The employer contributes to the plans on an hourly basis on behalf of each full-time employee. At the time of the hearing the employer, on behalf of full-time employees was contributing thirty cents per hour worked (up to a maximum of 40 hours per week) to the Canadian Commercial Workers Industry Pension Plan. It was contributing fifty-three cents per hour worked (up to a maximum of 40 hours per week) on behalf of full-time employees to the United Food and Commercial Workers Trusteed Benefit Plan. This latter plan provides short term and long term disability coverage including supplemental health care coverage. The employer was also contributing sixteen cents per hour worked (up to a maximum of 40 hours per week) to the United Food and Commercial Workers Trusteed Dental Plan - Ontario. The union initially took the position that it wanted parity with the full-time agreement on these benefits. In the context of first contract negotiations this demand may have initially contributed to the rigid approach adopted by the employer. The evidence of Mr. Springall is clear however that the union did not hold to this position and in fact indicated flexibility to the employer.

10. Mr. Springall testified that in a telephone conversation on October 22, 1990 with Mr. Richard Busch, the Personnel Manager for the respondent, he indicated that "he would need something on benefits". Mr. Busch, who testified for the respondent confirmed in cross-examination that he concluded that the union's position on benefits was negotiable at this point. Mr. Busch also conceded that the company was not prepared to move on its stance of no benefits at this time. Mr. Springall testified that in a subsequent meeting on October 31, 1990 he "tried to indicate movement by the union but the company was not going to move". Mr. Springall was not cross-examined by counsel for the employer on the meeting of October 31. Mr. Busch in his evidence gave a different version of this meeting with Mr. Springall. He testified that Mr. Springall, without mentioning their telephone conversation of October 22, 1990, reverted to the position requesting parity with the full-time employees on the issue of benefits. In cross-examination Mr. Busch indicated that he did not "call" Mr. Springall on this, or question this change. He testified that he felt Mr. Springall had reverted to the unions original position on benefits. In analysing the respective credibility of these two witnesses the Board has utilized the usual factors in reaching its conclusions as to whose evidence to accept on this issue. The Board prefers the evidence of Mr. Springall with regard to the areas of conflict concerning the October 31, 1990 meeting.

11. As indicated above, the key issue to be decided is whether or not the respondent had reasonable justification for the uncompromising bargaining position it adopted regarding benefits. Mr. Busch, the only witness called by the employer, indicated that the respondent's final offer to the union did not contain anything on benefits for several reasons. Before dealing with the reasons provided we note that there is no indication in the evidence before us that these reasons, as given by Mr. Busch, were ever provided to the union prior to the hearing. During the negotiations the employer consistently refused to offer any benefits (as defined above) and there is no evidence that at that time they provided reasons for adopting that uncompromising position. The employer may have *felt* that they had good reasons for their position but these were not communicated to the union prior to the hearing. Mr. Busch testified that the offer did not contain anything on benefits because the respondent felt that the offer they were making was a "cadillac" collective agreement, that the benefits enjoyed by the full-time employees had been negotiated over a six-year period, and that the company had upcoming negotiations involving its sister companies, "Strudex" and

“Spinning Mills”, and were afraid that if they gave the union what they were asking with regard to wages and benefits (it would amount to a 60% increase), it would set an extreme precedent and one which could be used against them. In final argument counsel for the respondent also argued that the employer had offered an extremely reasonable and generous package, and that the test the Board should utilize in deciding this case is whether the employer is prepared to agree to a standard first contract. Counsel asked us to conclude that because the respondent had made, in its opinion, a reasonable offer to the part-time employees this met the test of reasonable justification in section 40a(2)(b).

12. Mr. Luce, on behalf of the union, argued that the employer had been uncompromising with regard to the issues of benefits and wages. In addressing the employer’s contention that their proposal was a “cadillac” agreement, he emphasized that the parties have a mature bargaining relationship with regard to a full-time unit of 200. He contended that to agree to similar language, which appears to work well for the parties, for a unit of seven or eight people is not the same scenario “as if the union was coming in off the street”. Mr. Luce submitted that the position taken by the company that the union was asking for a 60% increase was inaccurate. It was his position that the testimony of Mr. Springall made it clear that the union was prepared to move on this, its initial position. He argued that the employer’s fear that the other full-time units at “Strudex” and “Spinning Mills” would also expect a 60% increase based on what the part-time workers at Kraus got was nonsensical in the context of their bargaining relationship. Mr. Luce stressed the need for the parties to start down the path of parity regarding wages and benefits. He argued that most of the part-time workers of the respondent were earning six dollars an hour in 1981 and were currently making seven dollars an hour, whereas the full-time workers were earning significantly more for similar work. It was his position that the part-time workers were treated like “second class citizens”, and that the benefit and wage proposals of the company would reinforce this belief.

13. In dealing with the meaning of the word “reasonable” in the context of section 40a(2)(b) the Board in *Formula Plastics Inc.*, [1987] OLRB Rep. May 702 stated:

...

24. But was the employer’s position taken without reasonable justification? *Much depends on our interpretation of “reasonable” in this regard. Obviously the employer in this matter did have reasons for taking this position in the sense that it hoped to achieve a contract provision of benefit to itself. However, in our view, “reasonable” must mean something more than simply a rational relationship between a bargaining position and a party’s self-interest.* This test is so minimal that it would make the relief provided by section 40a(2)(b) virtually inaccessible, a result which we find inconsistent with the remedial nature of this provision. Reviewing the section as a whole, and having regard to the Board’s analysis in *Nepean Roof Truss, supra*, and *Juvenile Detention Centre (Niagara)*, [1987] OLRB Rep. Jan. 66, we find it difficult to conclude that the legislation was designed to do no more than ensure that parties were looking after their own interests in a logical way.

25. Rather, in our view, the word “reasonable” imports an objective element into our consideration of the respondent’s justification for its position. *It is not simply a matter of whether the justification is reasonable from the respondent’s point of view, or even from the applicant’s.* The legislation draws us into an unavoidable assessment of whether a given proposal or position is reasonable in objective terms, a task which to some extent takes the Board into uncharted waters.

26. This is so, in part, because reasonableness is a relative concept; what is reasonable depends largely, if not entirely, upon the context in which such an examination is to be made. In considering section 40a(2)(b), such a context will include both the general landscape of labour relations and the specific labour relationship between the parties. In many cases such an assessment

will also require the weighing and balancing of the opposing interests of the parties which they seek to pursue by way of their negotiating positions.

...

[emphasis added]

We adopt the reasoning outlined above.

14. Mr. Busch on behalf of the employer indicated that one of the reasons why the employer did not move on the issue of benefits was because it was afraid that if it gave a sixty percent increase to the part timers at Kraus Carpet, it would set an "extreme precedent" for its upcoming negotiations with the other full-time units. We accept the union's position that this argument holds no merit in the context of this case. The full-time employees at "Strudex" and "Knitting Mills" were represented by the same union as the full-time and part-time employees of the respondent. Even if, in the context of the negotiations of a first contract, the employer gave the part-time workers a 60 percent increase, it is in our view unrealistic to assert that the full-time employees at "Strudex" and "Knitting Mills" would expect a 60 percent increase. The part timers obviously represent a "catch-up" situation whereas it appears far more likely that the full-time employees of the sister companies would expect to receive something comparable to that which the full-time employees of the respondent had received.

15. The employer also argued by way of justification for not offering benefits to the part-time employees that it took the full-time unit six years to negotiate their current level of benefits. On the evidence before us it is clear that while the union was seeking some benefits in the first collective agreement it was not necessarily seeking full parity with the full-time employees. It may be that the employer would have been justified in refusing to grant the part-time employees the identical level of benefits enjoyed by the full-time employees. However, that is not the factual context of this case. In this case the employer refused to consider the granting of *any* benefits even after the union had revised its expectations. To say that it took the full-time employees six years to negotiate their current level of benefits does not in itself provide a reasonable justification for refusing to even consider offering any benefits to the part-time employees.

16. The remaining justification provided by the employer at the hearing for its uncompromising position on benefits was its subjective belief that the proposal they had put forward for the contents of a collective agreement was a "cadillac" offer. Counsel for the respondent also invited us to find the proposal made by the employer to be a "cadillac" offer. This we are unable to do. The language agreed to by the employer for the part-time collective agreement to a large extent reflects the language currently in place in the full-time agreement. There are seven part-time employees and two hundred full-time employees. We accept Mr. Luce's point that we are not dealing with a scenario where the union is "coming in off the street". It is in the interest of both parties to extend the language with which they are familiar, to a part-time unit of seven people.

17. Therefore, we are not persuaded in the circumstances of this case that the offer made by the company could be termed a "cadillac" offer. It is not an offer of such generosity that its terms provide reasonable justification for the respondents uncompromising position in respect of benefits. Moreover, the company did not at any time offer any objective justification to the union or the Board for that uncompromising position. They did not, for example, offer any evidence as to the norm for part-time employees in their industry, or their geographic area, nor did they indicate that they could not afford to pay benefits or that their benefits would be too difficult to administer. There was no evidence (or argument) to suggest why the employer had singled out benefits as non-negotiable. The evidence indicated that the type of benefit plans currently in place lent themselves

to a gradual accrual of benefits. Accordingly, in the circumstances of this case, we are unable to conclude that the respondent has established reasonable justification for its uncompromising position on benefits.

18. Counsel for the respondent in final argument referred to the often quoted passage from *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005 at page 1008 which states:

• • •

16. It is clear from these provisions that the legislature has acknowledged the significance to the collective bargaining relationship of the first contract, and has given statutory recognition to the potential difficulties that may be encountered in achieving it. This remedy does not supplant the primacy of the free bargaining process; rather, it recognizes that the negotiation of the first agreement may sometimes be thwarted by unjustified intransigence. Although this is remedial legislation and should be given a liberal construction and interpretation, the scheme of section 40a does not envision the automatically imposed settlement of a first collective agreement in all cases where the parties are unable to negotiate one. What it provides is access to this remedy where certain conditions precedent have been met. These conditions are enumerated in subsections (a) - (d) of section 40a(2).

• • •

We agree that the remedy contained in section 40a was not intended to supplant the collective bargaining process. Nor was it intended to require the respondent to compromise on each and every item put on the negotiating table by the union. However, it does require the respondent to provide reasonable justification for an uncompromising bargaining position and to communicate these reasons to the union. Benefits, as defined in this instance make up a significant component of the monetary issues and are not an inconsequential item.

19. For all of the above reasons, we determined that the process of collective bargaining has been unsuccessful because of the uncompromising nature of the respondent's bargaining position on benefits. Since the respondent has not established reasonable justification for this position, the provisions of section 40a(2) required us to direct the settlement of a first collective agreement by arbitration, as we did in our decision dated December 12, 1990.

2384-90-U The Corporation of Massey Hall and Roy Thomson Hall, Applicant v. The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto and Jim Fuller, Respondents

Strike - Employer deciding to suspend two employees and advising Union accordingly - Employer requesting replacement employees from Union pursuant to collective agreement - Union responding that employer not entitled to suspend under collective agreement and indicating that replacements would not be sent - Employer continuing to allow the suspended employees to perform their jobs - Board finding no work stoppage, nor threat of a work stoppage - Board concluding that dispute essentially contractual and interpretation and application of collective agreement best left to arbitration - Application for unlawful strike declaration dismissed

BEFORE: Robert Herman, Vice-Chair.

APPEARANCES: *Ann E. Burke* and *Dave Taylor* for the applicant; *Thomas W. G. Pratt* and *James Fuller* for the respondents.

DECISION OF THE BOARD; January 16, 1991

1. This is an application under section 92 of the *Labour Relations Act* alleging that the respondent union ("I.A.T.S.E.") and its President Jim Fuller have engaged in or threatened to engage in an unlawful strike. The applicant employer has not relied upon any provision of the *Labour Relations Act* other than section 92 itself.

2. Section 92 of the Act reads as follows:

92. Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike or that employees engaged in or threatened to engage in an unlawful strike or any person has done or is threatening to do an act that the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike, the Board may so declare and it may direct what action, if any, a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

3. At the conclusion of the hearing, the Board reserved its decision. The following day it issued a decision dismissing the application, with reasons to follow, which are hereby provided.

4. The applicant employer operates and administers two concert venues in the City of Toronto, Massey Hall and Roy Thompson Hall. I.A.T.S.E. Local 58 is the bargaining agent for all the stage employees working for this employer at these two locations.

5. There are four permanent or full-time employees in the bargaining unit: the head electrician (David Still), the head soundman (Tom Saunders), the head carpenter, and the property manager. When a vacancy occurs (other than of a temporary nature) with respect to any of these positions, I.A.T.S.E. refers a number of candidates to the employer. The employer then interviews these individuals and selects from among them the new full-time employee. Due to particular rehearsal or performance requirements, additional employees may be temporarily required. As well, there may be a need to temporarily replace a full-time employee; for example, when one of the full-time employees is on vacation. When the employer does need them, it requests temporary employees from the union, which refers them to the employer, in accordance with the applicable provisions in the collective agreement. The numbers and skills of these referred employees vary, depending on the current needs of the employer. In order for the other employees in the bargaining unit to perform their work, there must be a head electrician and head soundman, or replacement personnel performing the work of their positions. If their work is not somehow performed, rehearsals and performances would have to be cancelled.

6. Still (the head electrician) and Saunders (the head soundman) were involved in an incident, or incidents, on or about November 30, 1990. The Board was not apprised of the nature of the incidents. As a result, the employer decided to suspend these two individuals. On the evening of Thursday December 6, 1990, the employer indefinitely suspended Still without pay, and advised the union accordingly. Management of the employer phoned Jim Fuller, the President of Local 58, and Bill Hamilton, the Business Agent of Local 58, advising them of Still's suspension, and indicat-

ing as well that Saunders was being suspended. The next day, after there had been an opportunity for the employer to meet with him, Saunders also was suspended indefinitely without pay.

7. Article 3 of the Collective Agreement, headed "Union Security", reads as follows:

- 3.1 The Manager agrees to employ only stage employees supplied by the Union and who are members in good standing by the Union.
- 3.2 The Union agrees to supply the number of competent persons required by the Manager to perform work under the provisions in this Agreement.

Relying upon this Article, on Thursday evening when it informed the union of the two suspensions, the employer requested that the union refer replacement employees for Still and Saunders. The union responded that the employer was not entitled to suspend employees under the collective agreement, that Still and Saunders were therefore still entitled to work, they were there to work, and if the employer felt otherwise it could file a grievance. The union also told the employer that replacements would not be sent. Over the course of that week-end, on several different occasions, the employer again requested of the union that replacement employees be sent for Still and Saunders, and the union again took the position that the employer could not discipline or suspend these employees, that no replacements would be forwarded, and that if the employer felt otherwise it could file a grievance. The union also suggested, during at least one of the conversations, that the employer could avoid the problem if warnings were substituted for the suspensions.

8. In light of the suspensions of Still and Saunders and the refusal of the union to refer replacement employees, and given the fact that neither rehearsals nor performances could be conducted without the work of the head electrician and head soundman, the employer faced some difficult choices. The two halls could be closed down, with rehearsals and performances cancelled. The employer could continue to attempt to secure replacements from the union. Or the employer could use management personnel to perform the work of Still and Saunders. If managers did perform the jobs of head electrician and head soundman, the employer felt that the rest of the bargaining unit employees would either picket or walk out. It based this fear upon two factors. First, approximately four years earlier, there had been another incident with the union involving differing views as to management's authority. In that instance, the union had sent to the employer six men more than the employer felt were required. The employer decided not to employ the six extra men, and the union in response withdrew the services of the remaining crew. A complaint was filed with the Board, but it was settled between the parties. Second, the chief witness for the employer, Patrick Taylor, the corporation's Senior Producer, had himself been in the union, and held numerous union positions, up until 1983. He believed there was a clause in the union constitution that did not allow union members to work with non-union personnel. Because of these two factors, management feared that any use of management personnel to perform the work in question would lead to a walkout of all employees.

9. There was evidence that Jim Fuller, the Local's President, told management that if Still and Saunders were not allowed to do the work, there might be a work stoppage. However, this statement was a reference to the fact that the other bargaining unit employees could not have performed their respective jobs if the jobs of head electrician and head soundman were not performed. The employer's submissions to the Board clearly indicated that it realized that the other employees could not have worked without the duties of head soundman and head electrician being performed. Fuller's statement was also confirmation that he was still unwilling to provide replacements for Still and Saunders. In context, it was not a threat that the other employees would refuse to work if management performed the jobs of Still and Saunders. The parties had not in fact ever

discussed this possibility, nor had the union made any comments as to what would happen if management performed the work.

10. Still and Saunders had been suspended, but the union would not refer any replacement employees. The employer felt it had no means of otherwise obtaining employees. It feared a walk-out if its own managers acted as head electrician and head soundman. If the jobs were not performed, the halls would have to close. Faced with this dilemma, and while continuing to insist that the two were on suspension without pay, and while continuing to urge the union to refer replacement employees, it allowed Still and Saunders to enter the building and to perform their jobs. It took no steps to bar or impede their access, nor to interfere with them while they worked. Still and Saunders therefore continued with their jobs as if not suspended, performing all their duties and missing no scheduled shifts. There is no question that the employer was aware that they would continue to report for work and continue to fully perform their duties. Fuller had advised the employer that if Still and Saunders were physically removed or barred, the other union members at the site were to let him know.

11. On Sunday evening, December 9, the union was advised of the periods of suspension. Patrick Taylor told the union that Saunderson's suspension would be effective until December 15, and Still's until December 29, 1990. Both individuals continued to work at the halls.

12. As of the hearing before the Board, on Wednesday, December 12, 1990, neither party had filed a grievance, and there had been no actual work stoppage of any sort, nor any verbal or other threat of a work stoppage. Though maintaining that Still and Saunders were under suspension and would not be paid, it was apparent at the hearing that the company wanted them to continue to perform their work until the Board issued a decision.

13. The remedies requested by the applicant employer in its materials are worth reciting:

- (a) an Order requiring the Respondents to cease and desist from calling or authorizing an unlawful strike or a threatened unlawful strike;
- (b) an Order requiring the Respondents to supply to the Applicant any employees required by the Applicant to maintain its productions;
- (c) an Order requiring the Respondents to instruct members of the Respondent Union to perform all necessary work for the Applicant;
- (d) an Order requiring members of the Respondent Union to report for work as required;
- (e) an Order requiring the Respondents to rescind any instructions to members of the Respondent Union to refuse to report for work as required;
- (f) such other Orders as may be appropriate.

In final submissions, counsel for the employer made clear that the primary direction it sought was a direction requiring the respondents to supply replacement employees to the applicant, as required by the collective agreement, and further, the direction should indicate that neither Still nor Saunders could be a replacement.

14. Based on the above, the employer submitted that the respondents were either engaged in or threatening an illegal strike. The employer submitted that the halls could not operate if the duties of head soundman and head electrician were not performed. The employer argued that the union, by refusing to supply it with replacements as required by the collective agreement, was threatening the employer with an illegal strike. This amounted to a refusal to work by employees

or members of the union. There was as well an implied threat, the employer submitted, in that there was a threat that the other employees in the bargaining unit would not work because of the understaffing. Alternatively, the employer submitted that without these replacement employees, management would itself have to perform the work of the suspended employees, and this in turn would lead the union to engage in an illegal strike. It therefore argued that the union's position amounted to a threat to unlawfully strike if management did the work.

15. The Board turns first to consider whether there was a threatened illegal strike, and whether the union in some manner threatened to strike if management personnel performed the work in question. Although the Board recognizes the employer's *bona fide* concern in this regard, there is simply insufficient evidence of any such threat. There are no statements or current actions by the union, or any of its officers, indicating that the union will take such action. The statement by Fuller that there might be a work stoppage if Still and Saunders didn't work was not a threatened strike but a statement emphasizing that the others would be unable to do their work or perform their jobs without a head electrician and head soundman. The duties of these two positions are pivotal to the ability of the employer to put on rehearsals and performances, and both parties are fully aware of this. Fuller was reinforcing how the employer had no choice but to let Still and Saunders continue to work, not because other employees would walk out, but because without them, the halls would have to close. The fact that four years ago a wildcat walkout occurred is not an event sufficiently connected to the instant events to support a conclusion that a strike has been threatened. Nor is the vague recollection of a former union member from approximately seven years ago about a clause in the union constitution (which was not placed before us) sufficient evidence upon which to conclude that the union or Fuller have threatened an illegal strike.

16. In this regard, we might usefully refer to the decision of the Board in *Acme Building and Construction Limited* [1987] OLRB Rep. Feb. 179, where the Board stated, at paragraph 1 therein, in part, as follows:

Therefore, I am not persuaded that there is a real or strong likelihood that picketing will occur so that the Board should exercise its discretion to grant, in effect, *quia timet* relief in respect of picketing. See paragraph 11 of *Maitland Ready Mix Concrete Products Limited*, [1980] OLRB Rep. Dec. 1751 where the Board stated at 1754:

"The application for relief is, in the Board's view, premature and may be compared to a request for an injunction *quia timet* before the courts. Injunctions *quia timet* are not granted by courts unless a plaintiff shows a strong case that the apprehended mischief will in fact arise, see *Cheeseworth v. Toronto* (1921), 49 O.L.R. 68 and *Matthew v. Guardian Assurance Company* (1919), 58 S.C.R. 47, and that the mischief, when it comes, will be very substantial, see *Fletcher v. Bailey* (1885), 28 Ch. D. 688. ...

Statements by the respondents that a picket line would be set up do not persuade the Board that an unlawful strike will occur at the site. The mere apprehension by the applicant that a picket line might be set up which in turn might lead to an unlawful strike is not sufficient, on the facts before the Board, to entitle the applicant to the granting of discretionary relief under either section 82 or section 123."

As for relief with respect to the statements made by Mr. Verner, those isolated statements have not promoted any further conduct and there have not been any subsequent statements of a similar nature made. In my opinion, these circumstances are analogous to situations in which an applicant seeks a cease and desist order before the Board in respect of an unlawful strike when the strike is over at the time of the hearing before the Board. I am not persuaded that it is likely that Mr. Verner or the respondent union will make such statements to the applicant in the future, and there is absolutely no suggestion that there is a history of such statements being made. In these circumstances, the Board does not exercise its discretion to grant the relief requested. See *Bechtel Canada Limited*, [1977] OLRB Rep. May 269 at 273; *Ontario Hydro*, [1985] OLRB Rep. April 577.

Therefore, the Board hereby refuses to exercise its discretion under section 135 of the Act to grant any remedy. This application is hereby dismissed.

17. Similarly here, the Board cannot conclude that there has either been an actual threat of an illegal strike, or the circumstances are such that there is a real or strong likelihood that an illegal strike will occur, if the employer uses management personnel to perform the work of head electrician and head soundman. The Board does not suggest that an employer must first induce an unlawful strike in order to obtain relief. To the contrary, the statutory language and the Board's approach to these matters is to prohibit any unlawful strike before it starts, provided the Board is satisfied that there is a threat of such a strike or a real likelihood of it. But a mere fear of a strike by the employer is not sufficient to lead the Board to interfere. Here, the union made no comments suggesting that the other employees would strike if management did the work of Still and Saunders. Past practice evidence was not sufficient to indicate a strike would occur. All the work in question was still being performed by bargaining unit employees, with the employer's full knowledge. On this evidence, the Board cannot conclude that there is a threat or real likelihood of a work interruption if management performs the two jobs. If an unlawful interruption did then result, management could of course apply forthwith to the Board. The application fails on this ground.

18. The Board turns next to the employer's primary argument, that the refusal of the union to refer replacement employees as required by the terms of the collective agreement, constituted an illegal strike, and amounted to a refusal to work by the employees or members of the union. The Board assumes, for purposes of this ruling, that a refusal of a union to refer union members as required under a collective agreement could constitute an illegal strike (in this regard, see *International Longshorement's Association, Local 273 et al v. Maritime Employers' Association et al* (1978) 89 D.L.R. (3d) 289; *The Ottawa Board of Education* [1983] OLRB Rep. May 694.) But even assuming such activity could constitute, in appropriate circumstances, an illegal strike, it does not do so here.

19. Employers and unions often engage in power struggles, each flexing their labour relations muscles, and each convinced that the other's authority or power is significantly less than it believes. In the instant case, the employer and the union take significantly different views of the powers each enjoys under the collective agreement. The employer, understandably, takes the view that it is entitled to impose discipline (including suspending employees) without the requirement that it first obtain the union's agreement that the discipline is proper. The employer believes that the union's right to object to a suspension is the customary right enjoyed by unions, to file a grievance. From the employer's perspective, to accede to the union's position would be to provide the union with a right of veto over any discipline imposed; if the union doesn't approve of the action, it will simply refuse to refer replacement employees and the employer will not be able practicably to enforce the suspension. The union, on the other hand, takes the view that the employer cannot discipline employees as it has. The union believes that the referral clause effectively gives it the sole right to staff the bargaining unit with replacement employees, so it declines to refer replacement employees. It can thereby in effect ignore the suspensions. The parties clearly have significant differences of opinion as to the correct meaning and application of several articles or clauses of the collective agreement.

20. What they don't have, however, is a scenario which involves an unlawful strike or raises mischief of the sort encompassed by the prohibition on illegal strikes contained in the *Labour Relations Act*. There has been no actual work stoppage, nor threat of a work stoppage. As discussed above, the evidence does not suggest that a stoppage is either imminent or a real likelihood if management personnel perform the work. The rehearsals and shows have all been fully performed. Still and Saunders remain willing and able to continue to perform all their duties and responsibilities.

ties and they continue to report for work. In effect, the employer has accepted that Still and Saunders can continue to work. While it maintains the position that they are under suspension without pay, it acquiesces (grudgingly) in their continuing the full performance of their jobs. Unlawful strike applications deal with work interruptions, threatened or actual. Because of the conduct of both parties, there does not appear to be any such interruption or real likelihood of one. There is no doubt that Still and Saunders will continue to show up as scheduled and to perform their jobs. Assuming, as we have, that a refusal to supply any replacement employees as required under a collective agreement can constitute an unlawful strike, in the unique circumstances before the Board, it does not.

21. The Board is being asked, through the expedited procedures for dealing with unlawful strikes, and in the absence of any work interruption or threat thereof, to rule upon the correct interpretation of particular clauses in the collective agreement, and then to direct the specific manner in which the union must fulfil its obligations under those clauses. The activity of real complaint is the union's refusal to comply with (what the employer asserts are) its obligations of referral under the collective agreement. The main remedy sought by the employer underscores this: a direction that the union refer replacement employees other than Still or Saunders. An order that directs that the respondents cease and desist from calling an unlawful strike, or that requires them to supply replacement employees, would not resolve the dispute. In response, the union might still refer Saunders or Still as the temporary replacement employees, on the basis suggested at the hearing, that they would be the two most senior, available members. The real disputes between the parties are not over an unlawful work stoppage, but over whether the employer has the right to discipline or suspend employees, whether the union must refer replacement employees in such circumstances, and whether it can refer employees on suspension. These are disputes for which arbitration is the appropriate resolution mechanism. Unlawful strike applications are expedited proceedings which deal with untimely interruptions in work, or threats of such interruptions. In the course of considering whether such unlawful activity has occurred and whether the Board ought to interfere, it may be necessary to interpret and apply numerous clauses in a collective agreement. But the Board will do so in these applications only when it is necessary in order to deal with the unlawful work interruption. Here, there has been no such interruption or threat of one, and in these circumstances the dispute between the parties is best dealt with in a different context.

22. For these reasons, this application was dismissed.

0839-90-U Canadian Paperworkers Union, Complainant, v. Mel Hall Transport Limited and 444024 Ontario Limited, Respondents

Interference in Trade Unions - Remedies - Unfair Labour Practice - Position eliminated and grievor laid off following attendance at certification hearing - Member of management continuing to do all work grievor had previously done - Board satisfied that employer motivated, at least in part, by grievor participating in Board proceeding and his exercise of lawful rights under the Act - Remedies including reinstatement with full compensation, posting and cease and desist order

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *W. H. Wightman* and *E. G. Theobald*.

APPEARANCES: *Michael A. Church*, *Brendan J. Morgan*, *Michael Hunter* and *Fred Cooper* for the complainant; *Richard Woods*, *Brian Peaslee* and *Donald Scotland* for the Respondents.

DECISION OF THE BOARD; January 24, 1991

1. This is a section 89 complaint alleging that the respondents have violated sections 64, 66, 70, and 80 of the *Labour Relations Act* ("the Act").

2. The background to this complaint is as follows. The complainant filed an application for certification (Board File No. 0525-90-R). That application was set down for hearing on June 22, 1990. On the agreement of the parties the matter was adjourned in order to allow the trade union to make an application pursuant to subsection 1(4) of the Act. (Board File No. 0838-90-R). This complaint was also filed. Subsequently, these three matters came before this panel. A decision with respect to File Nos. 0525-90-R and 0838-90-R was issued declaring that pursuant to subsection 1(4) the two respondents in this proceeding constituted one employer for the purposes of the Act and certifying the applicant for a bargaining unit of employees. Subsequently, the section 89 complaint was heard. The complaint raises allegations concerning the conduct of the respondents in relation to Mr. Fred Cooper (the "grievor") on June 22, 1990, and the subsequent layoff of Mr. Cooper on August 4, 1990. The complainant also raised an allegation concerning the respondents' conduct with respect to another employee, Mr. Pinalet, which it did not pursue in argument. That allegation (paragraph 24 of the complaint) is hereby dismissed.

3. It is the trade union's position that comments made by Mr. Richard Woods, President of Mel Transport Limited ("Mel Hall"), on June 22 were motivated by an anti-union animus in an attempt to dissuade Mr. Cooper from participating in the proceedings and are in violation of sections 64, 66, 70 and 80. Further, it is the union's position that the lay-off of Mr. Cooper was not for *bona fide* business reasons but was tainted by anti-union motive in violation of sections 64, 66 and 70.

4. It is the respondent's position that any comments and conversation which occurred on June 22 were in response to the surprise that Mr. Woods felt at Mr. Cooper's attendance at the hearing before the Board and to obtain information from Mr. Cooper with respect to his driver's licence. The layoff of Mr. Cooper from his position as assistant dispatcher is in response to a slow down in the respondent's business. It is the position of the respondents that the assistant dispatcher position was the only expendable position and that Mr. Cooper would have been transferred to a position of truck driver but for the loss of his driver's licence.

5. The Board's task in determining complaints of this nature is well established. The respondent employer must satisfy the Board on a balance of probabilities that the conduct complained of was in no way motivated by reason of Mr. Cooper's trade union activity and/or his participation in a proceeding under the Act. In *Pop Shoppe (Toronto) Limited* [1976] OLRB Rep. June 299, at page 301, the Board explained:

4. Section 79(4a) [now section 89(5)] of The Labour Relations Act places the legal burden upon the employer in complaints such as the one before us, to satisfy the Board, on the balance of probabilities, that it has not violated the Act. In order for the Board to find that there has been no violation of the Act it must be satisfied that the employer's actions were not in any way motivated by anti union sentiment; the employer's actions must be devoid of "anti union animus". (See the *Bushnell* case [1944] OR (2d) at page 442). The employer cannot engage in anti union activity under the guise of just cause or under the guise of business reasons. Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti union motive. The employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti union motive and which the evidence establishes to be the only reason for its conduct. (See *Barrie Examiner* [1975] OLRB Rep. Oct. 745 and *The Corporation of the City of London* [1976] OLRB Rep. Jan. 990).

5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278)....

6. Further in *The Barrie Examiner* [1975] OLRB Rep. Oct. 745, at page 749 the Board pointed out,

17. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

7. The conduct complained of was engaged in by Mr. Richard Woods, President of Mel Hall. The events on June 22 relate to comments made by him. The decision to lay Mr. Cooper off from the assistant dispatcher's position was also made by Mr. Woods. We note at the outset that in giving his evidence we found Mr. Woods to be unresponsive, argumentative and vague. He also made little attempt to conceal his opinion of union activity. While the circumstances surrounding the events support our conclusion, we are satisfied that the complaint is well founded on Mr. Woods' own evidence.

8. The main business of the respondent companies comprises a trucking operation. Although much of the business operates out of a London location, it is the operations out of locations in Burlington and Rexdale that are involved in the subject matter of this complaint. The grievor has been employed by Mel Hall for approximately seven years. For about five of those years he worked as a truck driver out of the Burlington location. That location was certified by the complainant approximately two years ago.

9. In 1989 while working as assistant dispatcher, Mr. Cooper posted for a position as a truck driver. At that time there was an agreement between Mel Hall and Mr. Cooper that he would remain in the position of assistant dispatcher. We are satisfied that the respondent preferred to have Mr. Cooper remain in that position because he performed the function well. There have been no concerns with respect to Mr. Cooper's job performance throughout his employment with Mel Hall.

10. As a result of a criminal charge related to drinking and driving, Mr. Cooper was aware towards the end of 1989 that he would, upon conviction, be losing his driver's licence for a period of time. In anticipation of that event, Mr. Pupeza, the union's business agent and Mr. Cooper requested a meeting with Mr. Scotland, the Operations Manager of Mel Hall. That meeting was to inform Mr. Scotland of the impending loss of licence and to discuss what effect, if any, it would have on the grievor's employment. That meeting was held in December, 1989. Mr. Scotland assured the grievor that the loss of his licence would not affect his employment in that he was then employed in the assistant dispatcher's position and was not required to drive in the course of his employment. Mr. Woods acknowledged that he was aware that Mr. Scotland had met with Mr.

Mr. Pupeza and Mr. Cooper concerning Mr. Cooper's licence although he denied or could not recall the extent of the information he learned at that time.

11. Mr. Cooper is the trade union's elected plant chairperson, representing the employees in the bargaining unit in Burlington. This is a position recognized by the employer under the collective agreement. While Mr. Woods attempted to underplay Mr. Cooper's role in representing the bargaining unit, that role included, in addition to being plant chairperson, participating on the negotiating committee, (and being present throughout negotiations with the employer) and being a signatory to the collective agreement.

12. On June 22, 1990, the parties attended at the Board in order to deal with the certification application for the Rexdale location. Mr. Cooper was present on behalf of the trade union. Upon arriving, Mr. Woods saw Mr. Cooper and immediately inquired of him why he was present. He did not inquire whether Mr. Cooper had permission to be away from work, nor it is apparent, did he care. Mr. Wood's explanation was simply he was "surprised" to see a Burlington employee "give up a job where he was needed" and he thought "that it was unusual he'd leave his post". Mr. Cooper had received permission to be absent from work that day. Other members of management were aware he would be attending at the Board. Subsequently, in the Board's hearing room while waiting for the return of the Board's Labour Relations Officer, Mr. Woods asked Mr. Cooper about the loss of his driver's licence. Upon learning that Mr. Cooper did not currently hold a licence Mr. Woods advised that this could well be a problem. When the trade union's counsel intervened, Mr. Woods indicated that he could speak to his employees whenever he wanted. Mr. Woods was at this time visibly upset and angry.

13. Subsequently, by letter dated July 19, 1990, Mr. Cooper was informed by Mr. Woods that effective August 4, 1990 the job of assistant dispatcher was being eliminated and, while Mr. Cooper remained without a licence, he would be laid-off. The only other available position was that of a truck driver. We heard evidence from the respondent's witnesses including Mr. Woods of earlier discussions about how to deal with a decline in business. It was suggested by Mr. Woods that there was a decision as early as April to eliminate the assistant dispatcher's position. We also heard considerable evidence of the "run-around" that Mr. Woods claims to have received in attempting to determine Mr. Cooper's ability to return to a truck driver's position and the status of his licence. Mr. Wood's explanation for asking Mr. Cooper on June 22 was that up to that point he hadn't been able to get a straight answer. We simply do not accept this. Mr. Cooper and the trade union had been entirely forthcoming at the time Mr. Cooper had been charged. We do not accept that Mr. Woods was unable, had he made an inquiry, to get any less than a full response from any of his management personnel. The company routinely does licence checks for its own insurance purposes and certainly had that option available to it had the question been posed. In addition there is no evidence that Mr. Cooper was asked by anyone prior to June 22 as to the then current status of his licence.

14. If there had been a decision to eliminate the assistant dispatcher position the employer could well have informed Mr. Cooper of the impending change in his status and at that stage discuss what effect, if any, the loss of his licence would have on his ability to move to another position or be laid-off. That did not occur. Nothing was communicated to Mr. Cooper prior to June 22. At that time, the reference was to the existence of "a problem" and subsequently Mr. Cooper was laid-off. We are satisfied that the move to eliminate the assistant dispatcher position in the circumstances was motivated at least in part by Mr. Cooper's participation in the proceedings before the Board with respect to the application for certification and his exercise of lawful rights under the Act. This conclusion is substantiated by the fact that subsequently, Mr. Wolochin, a member of management continued to do all of the work that Mr. Cooper had previously done, apparently in

violation of a provision of the collective agreement stipulating that non-bargaining unit employees will not perform work on any jobs which are performed by employees covered by the collective agreement. It is evident that the respondent gave no regard whatsoever to this provision of the collective agreement. There was also no explanation as to why the assistant dispatcher's position was expendable as opposed to one of a number of driving positions. In the result, we find that the respondent Mel Hall violated sections 64, 66, 70 and 80 of the Act by virtue of the conduct complained of on June 22 and the lay-off of Mr. Cooper from his position as assistant dispatcher.

15. In light of our finding that the lay-off was in violation of the Act, we need not at this time make any finding with respect to whether or not Mr. Cooper was offered or refused any work opportunities while on lay-off.

16. We hereby:

- (a) declare that the respondent Mel Hall Transport Limited has violated sections 64, 66, 70 and 80 of the Act;
- (b) order that the respondent Mel Hall Transport Limited cease and desist in its violation of the Act;
- (c) order the respondent Mel Hall Transport Limited to reinstate Fred Cooper to the position of assistant dispatcher with full compensation and seniority from the date of lay-off to the date of his reinstatement;
- (d) order that the respondent Mel Hall Transport Limited post for 60 consecutive days in conspicuous places in the workplace the notice attached as Appendix A to this decision.

17. The panel will remain seized in the event that the parties are unable to resolve any issue of compensation.

Appendix A**Labour Relations Act**

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE ARE POSTING THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD. AFTER A HEARING IN WHICH THE TRADE UNION AND THE EMPLOYER PARTICIPATED, THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY VIRTUE OF OUR CONDUCT IN RESPECT OF MR. FRED COOPER'S PARTICIPATION IN A PROCEEDING BEFORE THE BOARD AND BY LAYING OFF MR. COOPER FROM EMPLOYMENT.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE HAVE BEEN ORDERED TO REINSTATE MR. COOPER TO EMPLOYMENT AS ASSISTANT DISPATCHER WITH FULL COMPENSATION AND SENIORITY.

MEL HALL TRANSPORT LIMITED

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 24TH day of JANUARY, 19 91.

1718-89-R; 1745-89-U; 2134-89-U International Brotherhood of Painters & Allied Trades - Local 1824, Applicant v. Mike's Painting & Decorating a Division of: Mike McMahon's Painting & Decorating Ltd., Respondent v. Group of Employees, Objectors; International Brotherhood of Painters & Allied Trades, Local 1824, Complainant v. **Mike's Painting & Decorating Ltd.**, Respondent; Chris Butler, Robin Askin and John Murphy, Complainants v. International Brotherhood of Painters & Allied Trades, Local 1824, Respondent.

Certification Where Act Contravened - Discharge for Union Activity - Interference in Trade Unions - Remedies - Unfair Labour Practice - Union applying for automatic certification and relying on alleged employer misconduct - Employee objector alleging union misconduct - Board dismissing objector's complaint for stating no *prima facie* case - Board finding discharge of three union supporters motivated by anti-union animus and that pre-conditions of s.8 of the Act satisfied - Certificate issuing without vote - Remedies including reinstatement with compensation, posting and union meeting at employer's shop during company time in absence of any company officials

BEFORE: Robert Herman, Vice-Chair, and Board Members W. N. Fraser and J. Redshaw.

APPEARANCES: E. Mitchell, George McMenemy and Brian Beaumier for the applicant; T. J. Billo, Michael McMahon and Maureen McMahon for the respondent employer; John Murphy and Chris Butler for the employee objectors.

DECISION OF THE BOARD; January 8, 1991

1. This is an application for certification, in which the applicant union relies upon the provisions of section 8 of the *Labour Relations Act*. In a companion complaint pursuant to section 89 of the *Labour Relations Act*, the applicant/complainant alleges that the employer has breached sections 64, 66, and 70 of the Act. The employee objectors in the certification application have filed their own complaint pursuant to section 89 of the *Labour Relations Act*, alleging that the union breached sections 70 and 71 of the Act.

BACKGROUND

2. Before the hearing into these proceedings began, the parties met with a Labour Relations Officer and were able to agree on the appropriate bargaining unit description. The parties agree that there were fifteen employees in the bargaining unit as of the relevant time, and that the union had filed membership support on behalf of seven of those fifteen employees. The parties further agreed that the union was in a vote position, subject to the resolution of allegations with respect to certain membership evidence, and subject to the resolution of the allegations pursuant to section 8 of the Act.

3. By preliminary objection, the applicant union asked that the section 89 complaint filed by the objecting employees (Board File No.2134-89-U) be dismissed as it failed to disclose a *prima facie* case. After entertaining the parties' submissions, the Board orally dismissed Board proceeding 2134-89-U, for reasons provided at the hearing, which we repeat here.

4. Section 70 of the Act reads as follows:

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a

member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

5. Section 71 of the Act reads as follows:

71. Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.

6. The Board was satisfied that there was no *prima facie* case that the union had breached these sections insofar as the conduct set out in the complaint was concerned. With respect to the alleged breach of section 71 of the Act, the only paragraph in the Complaint (Form 58) raising an issue with respect to this section was paragraph 2. It is not a breach of section 71 for a union simply to attempt to persuade an employee at his or her place of work to become a member of the union. Section 71 does not prohibit this behaviour, and does not make any such conduct an unfair labour practice.

7. With respect to the allegations that the union had breached section 70 of the Act, in order for such a breach to have occurred there must be conduct which amounts to intimidation or coercion, linked with an exercise of rights under the Act. Paragraphs 1, and 3 to 13 of the Complaint, deal with this alleged breach. The conduct set out in paragraphs 3 to 13 which we have assumed (for purposes of this ruling) both occurred and was undertaken on behalf of the union, did not amount to threats, intimidation or coercion within the meaning of section 70. Employees will be subject to some pressure or persuasion of both views during a union's organizing campaign. To find the behaviour alleged as constituting an unfair labour practice would be to find illegal much of the behaviour involved in organizing campaigns and in campaigns in opposition to the union. The facts set out in the Complaint do not allege a threat or coercion of the sort that is impermissible within the meaning of section 70.

8. With respect to the allegations contained in paragraph 1 of the Complaint, the only "threat" alleged is that George McMenemy (the union's business agent) yelled at an employee, Chris Butler, in order to get him to sign again a membership card. In the Board's view, "yelling" alone is not a violation of section 70, and simply yelling at an individual in order to get them to sign a membership card does not constitute a breach of this section. "Yelling" is part and parcel of many campaigns, either for or against the union, and it would make no sense to conclude that when one yells one commits an unfair labour practice.

9. For these reasons, the Board dismissed the complaint in Board File No. 2134-89-U. The Board also indicated that the employee complainants remained entitled to fully participate in the certification application and the union's section 89 complaint, and that the facts alleged in the complaint, which had just been dismissed, could well be relevant to the matters remaining before the Board. To the extent those matters were relevant, the parties were free to raise and rely upon them.

10. The Board then turned to a consideration of the union's application for certification and section 89 complaint. The union advised the Board that Chris Butler, one of the grievors in its section 89 complaint, no longer wished to be represented by the union. The union was not seeking any remedy on his behalf, but it would continue to rely upon his treatment by the employer as relevant to the issues. Butler was therefore dropped as a grievor.

11. The Board heard the evidence of numerous witnesses over ten days of hearing. At the conclusion of the hearing, the Board gave a short oral decision, with reasons, in which it concluded that both the membership evidence and the Form 9 Declaration were reliable and would be

accepted by the Board. With respect to sections 8 and 89 of the Act, the Board was satisfied that the discharges of Butler, Fallahay, and King were motivated in large part because Maureen McMahon, one of the co-owners of the respondent, had learned of the union organizing campaign and had learned that these three individuals had signed membership cards. The Board was therefore satisfied that the employer had breached sections 64, 66, and 70 of the Act in its discharge of these three employees. In all the circumstances, the Board ruled that it was satisfied that the three pre-conditions of section 8 of the Act had been met, and the Board directed that a certificate issue to the applicant, effective as of the next day, November 7, 1990, certifying the applicant with respect to the following bargaining unit:

all painters and painters apprentices in the employ of the respondent in the ICI sector of the construction industry, save and except non-working foremen, and persons above the rank of non-working foreman.

With respect to further remedial relief, no remedies had been sought on behalf of Butler. The Board directed that King and Fallahay be reinstated with compensation, subject to the usual principles of mitigation. The Board indicated that the regular posting, appropriate to cases of this nature, would be directed. The Board noted that the union had asked for an access order, consisting of a direction from the Board requiring the employer to provide a single audience with employees at the employer's shop or office, of approximately one hour's duration during company time within the following two weeks, where representatives of the applicant union would be entitled to address the employees present, in the absence of any officials or managers of the employer. The Board ruled that it would grant this remedy, the meeting date and time to be worked out in consultation between the union and the company, provided that the meeting took place no later than November 23, 1990. The Board indicated it would remain seized with respect to all remedial aspects of its decision. The Board further indicated that its reasons in writing would follow, with the appropriate posting to be attached to these reasons. We now provide those reasons.

12. It was necessary to make findings of credibility as several witnesses gave contradictory versions of events. In the result, the Board discounts the evidence of Chris Butler and Robin Askin, where such evidence is in conflict with the evidence of other credible witnesses. As will be seen, the key player for the employer was Maureen McMahon, one of the co-owners, who was responsible for the discharges of the three employees in question. We did not find her to be a particularly credible witness. Her evidence was internally inconsistent and she changed her evidence in a number of areas during the course of her examination and cross-examination. Her evidence was also inconsistent with that of other witnesses who we found to be credible. Further, her version of events was in several respects simply not plausible. In several areas of conflict, we have preferred the evidence of King and Fallahay to that of Maureen McMahon, and we have also preferred their evidence to that of Mike McMahon, for we did not find his evidence to not have been particularly credible. Finally, we found George McMenemy to have been a credible witness and we accept his evidence.

THE FACTS

13. Mike's Painting is a company performing painting services in the I.C.I and other sectors. It is owned and operated by Mike McMahon and his wife Maureen McMahon. They act as co-owners and run the company together. When either is away, the other has full authority to operate all aspects of the company, and does so.

14. Mike's Painting had previously been organized by the applicant in the I.C.I sector, but those bargaining rights were terminated as a result of a decertification proceeding before the Board in 1988. Subsequent to that time however, George McMenemy, the business agent of the applicant

union, continued to appear occasionally at job sites where the company was painting, speaking to employees about whether they wished again to be organized. Mike McMahon was aware of a number of these efforts by McMenemy. They had encountered each other on sites and Mike McMahon told McMenemy he didn't want him approaching his employees during working hours. All the employees of the company appeared to be aware that Mike McMahon liked neither the union nor McMenemy in particular.

15. In early October, 1989 McMenemy was phoned by one of the employees who asked for his assistance in trying to organize the employees. As a result, a meeting was held at the home of one of the employees, Brian Beaumier, in the evening of Thursday, October 12. McMenemy and Beaumier were there, as were Chris Butler, Dave Fallahay, Steve King, and several other employees. The group discussed the union and whether the employees ought to join, and the pros and cons of being organized. The employees then signed membership cards and each paid a dollar.

16. The company alleged that Butler did not voluntarily sign his membership card, because he was too drunk at the time to understand or appreciate what he was doing, and because he was coerced by McMenemy into signing. In his testimony, Butler maintained that he had not paid a dollar in support of his card. It was also alleged by the company that Butler's membership card was improper because it was the second card that he signed that night. However, having heard the evidence, the Board is satisfied that Butler, without being coerced or unduly influenced by McMenemy and while sufficiently aware of what he was doing, both signed the membership card filed on his behalf by the union and paid the accompanying dollar.

17. The next day, Friday, October 13, the application for certification was filed with the Board. Mike McMahon had a long planned recreational activity scheduled for the week-end, and accordingly left town on Friday evening, not returning until Sunday evening. The critical events occurred during this period, while Maureen McMahon was solely in charge. That weekend, there were two jobs for which the company arranged overtime work. The first job involved finishing painting at Holy Rosary School. Maureen testified that this job was under deadline, that it was urgent that it be completed that week-end, and that the contractor had warned Mike's Painting that the job had to be completed or the company would not get paid. On the afternoon of Friday, October 13, when he was picking up his pay cheque at the completion of his work week, Maureen asked Butler if he could work at the Holy Rosary project the following day.

18. Butler was an employee of some duration who had and was known to have a chronic drinking problem. Because of this, he had on previous occasions, particularly Fridays and Saturdays, failed to show up for work. Maureen herself doubted Butler's reliability or ability to show up. Several times before, when Butler had been asked to work overtime on Saturday shifts, Maureen had bet him that he wouldn't show up. Maureen had won the bets. This Friday afternoon, she again bet Butler that he would not show up, for the job at Holy Rosary School. Butler was the only employee who Maureen asked to go to the job on Saturday.

19. The second job that the company maintains it had to complete that week-end was at a new Future Shop. Although Maureen McMahon initially testified that this job had to be completed by Saturday, October 14, she agreed in cross-examination that the job had only to be completed by the end of the week-end. Mike McMahon also testified that the job had to be completed over the week-end, and not by the end of Saturday. Despite the claimed urgency of this job, just as she had with the job at Holy Rosary School, Maureen McMahon only arranged on Friday afternoon for someone to work the next morning. She asked Dave Fallahay, the lead hand for the project and the painter with the best knowledge of what was required to finish the job, if he could go to the Future Shop the following day to complete the job. Fallahay agreed to come in Saturday, but told

her that he needed as many as 4 more painters to complete the job. Fallahay knew the amount of work necessary to finish up, and he knew that he alone could not hope to complete the job in a single day. Maureen told Fallahay that she would get him further assistance. That Friday evening, around 8.30 p.m., she phoned Steve King to ask if he could work as well the next day. Mr. King agreed but said he could not work the full day. Maureen indicated that would be acceptable.

20. The next morning, both Fallahay and King showed up as scheduled, before 8:00 a.m., at the Future Shop site. Maureen McMahon was there and remained until the two of them got started. She then left to perform other tasks, telling them she would return later in the day. During the day, she discovered that Butler had not shown up that morning at the Holy Rosary School.

21. Maureen McMahon returned to the Future Shop site around 3 o'clock in the afternoon. She initially testified that when she got to the site she discovered that Fallahay and King had only performed about one hour's work. She then testified that she spoke to Tony (she was unable to remember his last name nor the company he worked for), an electrician on site, who told her that Fallahay and King had left that morning, at approximately 10:00 to 10:30 a.m. She also relied upon her observations of the volume of work they had completed. She concluded that they had left early in the morning. The Board concludes that Fallahay and King had worked until approximately noon on that Saturday, at which time they had gone for lunch. Returning from lunch, frustrated by the fact that Maureen McMahon had not provided more assistance as promised, and certain that the two of them alone could not finish the work that day, they left the site around 1:30 p.m..

22. Maureen McMahon was angry. She drove to Fallahay's house, where she spoke with Fallahay's common-law spouse, Eileen. The two of them had known each other for some time. Fallahay was not there. She then drove to the company office, where she typed up termination letters for Butler, Fallahay, and King. At that point, she had not spoken to any of the three employees. That evening, at approximately 9:30 p.m., she phoned Fallahay, and arranged for him to return to the Future Shop job the next morning. She said nothing about any termination. Fallahay told her that he and King had worked that day until 1:30 p.m. Maureen McMahon did not phone King to ask that he too work the next morning. Presumably she didn't phone him because he had only agreed to work part of the day Saturday, which he had. Nor did she phone Butler to see if he would work Sunday. She testified that she was waiting for Butler to come in Sunday, as he was like that, not coming in one day and then showing up the next.

23. On Sunday morning, Maureen and her working foreman arrived at the Future Shop. She brought Fallahay's termination letter with her and left it in her truck. Fallahay was already there working. Neither Maureen nor Fallahay were too pleased with the other at that point. Maureen said good morning, Fallahay kept working. She then asked him what time he had worked until on Saturday, and he again told her until around 1:30 p.m. Maureen testified that Fallahay was not as communicative with her as she felt appropriate, and she felt his manner was flippant. She went and retrieved the termination letter from her truck. She handed it to Fallahay. The termination letter, dated the day before (October 14, 1989) and stated to be effective as of that date, indicated that Fallahay was being terminated for his failure to remain at the site on Saturday. Fallahay left the site. The work was then performed by Maureen McMahon, her working foreman, and one other employee. All three were painters able to perform the work. They worked on the job for twenty-two person-hours that Sunday. As noted, Fallahay and King had worked from early morning the day before until around the noon hour, a total of approximately eight person-hours of work. The job therefore involved approximately thirty person-hours of work that weekend, and even then was not complete. The company was called back several times, after October 16th, in order to cure deficiencies. Based on this, and the testimony of Fallahay and King, it is clear that Fallahay and King by themselves could not have come close to completing the job on the Saturday.

24. Also that Sunday, in the morning, Maureen McMahon went to Butler's house. He was apparently in bed. She left his termination letter there. The letter was dated the prior day, Saturday, October 14, 1989. It stated that due to his failure to appear as required that morning, he was terminated effective forthwith. Maureen McMahon testified that he was discharged because the job was urgent, and Butler's non-attendance was a matter of some real concern to the company. However, as of the date she gave this testimony, April 12, 1990, approximately 6 months after terminating Butler because the Holy Rosary School job was so urgent, that job was still not completed. Butler was re-hired by the company, but only after he testified in these proceedings. In his testimony, though not asked he volunteered that he had not paid the dollar in support of his membership card, and that his discharge had been fully justified.

25. Sunday evening Fallahay phoned George McMenemy and told McMenemy that he and Chris Butler had been fired. Also that evening, Mike McMahon returned home from his week-end off, only to discover that Maureen had fired three employees. She related the weekend's events to him.

26. The next morning, Monday October 16th, Fallahay, King, and Butler arrived at the office, Fallahay and Butler to pick up their equipment and other personal possessions. Mike McMahon gave King his termination letter. This was the first official notice to King that he was terminated.

27. Although Mike and Maureen McMahon testified to the contrary, we find that when he terminated King, Mike made comments to both Fallahay and King linking their discharges to having joined the union.

28. Shortly after this conversation, Mike began his rounds of various company projects. At the second site he visited, he spoke to one of his employees, Robin Askin. Mike McMahon asked Askin whether he'd signed a membership card, and if he had, asked him where he was going to work next.

29. At another site later that morning, Mike encountered McMenemy speaking to employees. They had a loud, volatile discussion about McMenemy not bothering company employees at work. Mike testified that it was only at this point that he or Maureen knew of the union organizing campaign. After these events, McMenemy tried to approach a few of the employees about signing membership cards, but none of them were willing to talk to him.

30. This completes the chronology of events. Before leaving the facts, we would comment on the prior attendance records of Fallahay and King. The employer produced copies of notices documenting past attendance problems, apparently issued to Fallahay and King. Maureen and Mike McMahon both testified that the notices had been provided to Fallahay and King at the times in question. Fallahay and King both testified they never received them. Maureen McMahon testified that all incidents (of late arrival, non-attendance etc.) were recorded contemporaneously in a "critical incident book", but that book was not placed in evidence. As we found Fallahay and King more credible, we conclude that the notices were not issued to them. In short, the evidence does not support the conclusion that Fallahay and King had unusually poor attendance records. As well, there is insufficient evidence that their attendance was not comparable to that of the other employees.

31. There were numerous other incidents of which the Board heard evidence, but we do not consider it necessary to recite them here.

THE DECISION

32. We turn first to a consideration of the sufficiency and reliability of the membership evidence filed on behalf of the applicant and the sufficiency and propriety of the Form 9 Declaration. As noted, the Board heard the evidence surrounding Butler's card and accompanying dollar. The Board concluded that Butler's membership was regular and reliable in all respects, and the Form 9 Declaration was proper and could be relied upon by the Board. Simply put, the evidence did not substantiate any of the allegations. In these circumstances, we need not deal further with this matter.

33. We turn next to the request pursuant to section 8 of the Act. For a discussion of the approach the Board takes to this section, and for a recital of some of the relevant jurisprudence, we would refer the parties to *Royce Dupont Poultry Packers*, [1989] OLRB Rep. May 492. Section 8 of the Act reads as follows:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

34. Sections 64, 66, and 70, the unfair labour practices relied upon by the union, read as follows:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

35. In order for a certificate to be issued pursuant to the provisions of section 8, the Board must be satisfied that three conditions have been met:

- (1) The respondent must have contravened the Act.
- (2) The contravention must have resulted in a situation such that the true wishes of the employees of the employer are not likely to be ascertained.
- (3) The applicant must have membership support adequate for purposes of collective bargaining.

36. The applicant had membership support of approximately forty-six per cent. There is therefore no issue with respect to the third requirement.

37. Turning to the first requirement, has the respondent contravened the Act? In answering this, we must decide whether the discharges were even in part motivated by impermissible reasons as described in the provisions of sections 64, 66, and 70 of the Act. (See, for example, *Barrier Examiner*, [1975] OLRB Rep. Oct. 745; *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299.)

38. The company maintains it discharged the 3 employees on similar grounds, a combination of the urgency of the jobs, their poor attendance records, and their failure to appear for or remain at work on Saturday, October 14, 1989. It maintains it was unaware of the union organizing campaign at the time, or of whether these employees had signed cards.

39. With respect to Butler, this was an individual whom Maureen McMahon was fully aware had a terrible attendance record, and was almost completely unreliable insofar as week-end work was concerned. Nevertheless, the day before, she scheduled him for the job. When he failed to show, Maureen McMahon discharged him. The company claimed the job was urgent, but had not completed it 6 months later. They claimed his poor attendance record also justified discharge, but they had always before forgiven his poor attendance. The company rehired Butler after he gave evidence supportive of the employer's position, even though he was originally a grievor in the section 89 complaint. The reasons given for Butler's discharge are not plausible in the circumstances.

40. With respect to Fallahay and King the reasons for their discharges are similarly implausible. They had not had particularly poor attendance records. The Future Shop job was not particularly urgent. Maureen McMahon had only arranged at the last minute, Friday afternoon, for Fallahay to come in, and she did not arrange for King until Friday evening at 8:30 p.m., and then only for part of the day. Fallahay, as lead hand, best knew the job and told her that 4 more men were needed, yet she did not arrange for them. When she saw Saturday afternoon that most of the work remained to be done, she only arranged for Fallahay to return Sunday. The job was not in any event finished that weekend, and there is no evidence to suggest she could not have arranged sufficient crew to complete it. So the job was not handled by Maureen McMahon in a manner that suggested urgency. And the departure of King and Fallahay around 1:30 p.m. on Saturday would not appear to be misconduct of the sort that would merit discharge. King had remained for as long as had been agreed. King had not been contacted by Maureen McMahon to return the following day. From King's perspective, he had shown up on Saturday as scheduled, he had worked for as long as planned and he was greeted Monday morning with his termination letter. There don't appear to be grounds for any discipline, let alone discharge. Although Fallahay had not worked as long as promised, Maureen knew he was expecting more assistance and knew that without it he could not have

finished the job. She still asked him to return Sunday, and he did. It is hard to explain his discharge in these circumstances.

41. The lack of credibility of the reasons justifying the discharge of the three employees suggest that there were other reasons for Maureen McMahon deciding to discharge them. Given the timing of the union organizing drive and the known opposition of the company to the union, the logical inference is that sometime on Saturday Maureen McMahon became aware of the union organizing drive and the fact that these employees had signed union cards. In large part, it was for this reason that she discharged them. This view is supported by the evidence that on Monday, October 16, Mike spoke to Fallahay and King at the company office and made comments indicating the discharges were linked to union activity. And later that morning, he spoke to Robin Askin and again made comments linking job security to not supporting the union. These comments were made at a time he denied knowing of the union drive. In all these circumstances, the Board concludes that the discharges of the three employees in question were motivated by their having signed union cards and their support for the applicant union. Discharges for these reasons contravene sections 64, 66, and 70 of the Act.

42. The only remaining pre-condition of section 8 to be considered is whether the contraventions resulted in situations such that the true wishes of the employees would not likely be ascertained. McMenemy approached employees after the discharges, but they were unwilling to even be seen talking to him. The discharges and the reasons for the discharges would be well known to employees in the bargaining unit. Employees would quickly have learned that three fellow employees had been discharged because of their support for the union. Employees would have concluded that their own job security was linked to their opposition to the union, and that the company would continue to penalize employees for union support. Given this, the Board is satisfied that the true wishes of employees would not likely be ascertainable. All the pre-conditions of section 8 are therefore met.

43. For these reasons, the Board directed that the certificate issue. Further, we directed that King and Fallahay be reinstated forthwith, with full compensation.

44. Insofar as the other remedial relief is concerned, in *Wilco Canada Inc.* [1983] OLRB Rep. June 989, the Board stated:

50. As reflected in a number of decisions, the Board has recognized that the issuance of a certificate under section 8 will often not by itself suffice to place the applicant in the position that it would have been in if the respondent had not contravened the Act. This is particularly true where, as in the present case, the respondent has engaged in flagrant violations of the Act by threatening employees' job security generally and discharging several union organizers. In such circumstances, it is appropriate for the Board to exercise its remedial jurisdiction under section 89 of the Act not only to reinstate those individuals with appropriate compensation, but also to attempt to establish conditions that will promote fuller employee participation and understanding with a view to producing a more constructive climate for the exercise of the collective bargaining rights which will flow from these proceedings. Failure to do so would risk consigning the section 8 certificate to a climate where a collective agreement could be difficult, if not impossible, to realize. (See, for example, *Manor Cleaners Limited*, *supra*; *Robin Hood Multi-Foods Inc.*, [1981], OLRB Rep. July 1972; and *K-Mart Canada Limited* (Peterborough), [1981] OLRB Jan. 60.) Accordingly in addition to directing reinstatement of Messrs. Molyneux, Bishop, and Duquette, and recall of Dan Wood, with compensation (to the extent indicated above), the Board finds it appropriate to direct the respondent to provide the union with employee lists, to permit union representatives to meet with employees on each of its shifts for a maximum of one hour on company premises during working hours, and to provide the union with access to employee bulletin boards. In view of the large number of layoffs which have occurred during the course of these proceedings, we also find it appropriate to supplement our usual "posting" order

with a "mailing" to ensure that all bargaining employees will receive notice of the Board's decision in this matter.

45. For similar reasons, the Board directed the posting and access order referred to above. Accordingly, we order that the respondent:

- (1) post copies of the attached Notice, marked Appendix, after being duly signed by either Mike or Maureen McMahon, in conspicuous places in its office or premises, where they are likely to come to the attention of employees, and keep the notices posted for sixty consecutive working days; reasonable steps shall be taken by the respondent to ensure that the said Notices are not altered, defaced or covered by any other materials; reasonable physical access to the premises shall be given by the respondent to a representative of the applicant so that the applicant can satisfy itself that this posting requirement is being complied with.

46. The remedial direction with respect to access we need not repeat here, as it has been dealt with fully above.

47. We shall remain seized with respect to any remedial aspects.

Appendix
Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A SERIES OF HEARINGS ARISING OUT OF THE EFFORTS OF THE PAINTERS UNION LOCAL 1824 TO BECOME THE COLLECTIVE BARGAINING AGENT FOR THE EMPLOYEES WITH RESPECT TO THE INDUSTRIAL, COMMERCIAL AND INSTITUTIONAL SECTOR OF THE CONSTRUCTION INDUSTRY IN THE PROVINCE OF ONTARIO. THE ONTARIO LABOUR RELATIONS BOARD HAS FOUND THAT WE HAVE VIOLATED THE LABOUR RELATIONS ACT BY DISCHARGING CHRIS BUTLER, DAVE FALLAHAY AND STEVE KING BECAUSE OF THEIR SUPPORT FOR THE UNION AND THE BOARD HAS REINSTATED MR. KING AND MR. FALLAHAY (MR. BUTLER WAS NOT ASKING THAT HE BE REINSTATED OR COMPENSATED), AND AWARDED THEM FULL COMPENSATION. THE BOARD HAS ALSO ISSUED A CERTIFICATE TO PAINTERS UNION LOCAL 1824 BECAUSE OF THE COMPANY'S BREACH OF THE LABOUR RELATIONS ACT. THE BOARD HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS:

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

MIKE'S PAINTING & DECORATING
A DIVISION OF MIKE McMAHON'S
PAINTING & DECORATING LTD.

PER:

MIKE OR MAUREEN McMAHON

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this

8TH day of

JANUARY

1991

2200-90-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, Applicant v. **Nichirin Inc.**, Respondent v. Group of Employees, Objectors

Certification - Employer - Trade union asserting that four persons should be added to list of employees filed by Respondent employer - Respondent contending that the four actually employed by two employment agencies, not Respondent - Board concluding that Respondent bearing ultimate burden of workers' remuneration and that Respondent exercising high degree of control over the four - Board directing that the four be included in bargaining unit for purposes of the count

BEFORE: *S. A. Tacon*, Vice-Chair, and Board Members *R. W. Pirrie* and *H. Peacock*.

APPEARANCES: *L. N. Gottheil*, *Craig Grant* and *Cheryl Chaput* for the applicant; *J. Liberman* and *Frank Johnson* for the respondent; *Mary Hammond*, *Ernest Crawford*, *Helen Lewis*, *Derek Hammond*, *Kath Spedding* and *Linda Littlewood* for the objectors.

DECISION OF THE BOARD; January 9, 1991

1. The name of the respondent is amended to read, "Nichirin Inc."
2. This is an application for certification in which the parties met with a Board Officer and resolved a number of matters.
3. Having regard to the agreement of the parties, the Board finds that the following constitutes a unit of employees appropriate for collective bargaining:

all employees of the respondent in the City of Brantford save and except supervisors, those above the rank of supervisor, office, clerical and sales staff.
4. The applicant asserted that four persons should be added to the list of employees filed by the employer, namely, Pat Milancey, Susan Leach, Gary Bassett and Darrin Ballard. The applicant contended that the four were employees of the respondent performing bargaining unit work on the application date. The respondent and the employee objectors took the position that the four should not be included on the basis that the respondent is not their employer.
5. A hearing was convened to deal solely with this issue. At that hearing, the parties agreed that the persons were at work on the application date and were performing bargaining unit work. The sole basis for the position of the respondent and the employee objectors was that the respondent was not the employer of the four. It should also be noted that, at the hearing, counsel for the respondent indicated that one person listed on Schedule D should be deleted from that list as the individual in question had not returned to work as anticipated on December 19, 1990. The parties agreed that the person did not satisfy what is known colloquially as the "30/30 rule" and should not be included in the bargaining unit for the purposes of the count. The Board informed the parties that this agreed deletion did not affect the issue presently before the Board.
6. The parties were afforded full opportunity to lead evidence, question witnesses and make submissions with respect to the issue in dispute. The Board does not regard it as necessary to recount that evidence in detail nor to set out separately the submissions of the parties. The Board has carefully considered the testimony of the witnesses and the parties' representations and the relevant jurisprudence in reaching its decision.

7. It is useful to begin with the following passage from *K Mart Canada Limited*, [1983] OLRB Rep. May 649:

36. One of the issues which the Board must decide in these proceedings is whether or not the grievors are employees of the respondent. The Board's power to make that determination is derived not only from section 89, but also from section 106(2) of the Act, under which "the decision of the Board thereon is final and conclusive for all purposes". Counsel for the union contended that the grievors were employees of the respondent for purposes of the *Labour Relations Act*. In support of that contention, he referred the Board to a number of Board decisions and arbitration awards. Counsel for K Mart, on the other hand, argued that the persons in question were employees of the respective agencies which supplied their services to the respondent. He also referred the Board to a number of judicial and administrative authorities, and emphasized that "control", which originated as one of the primary tort law criteria pertinent to the issue of an employer's vicarious liability, should be entirely disregarded, or given very little weight in determining whether the respondent is the employer of the "temporary" employees supplied to K Mart by various employment agencies.

37. The criteria which the Board considers helpful in determining which of two (or more) entities is the employer for purposes of the *Labour Relations Act* include the following:

- (1) the party exercising direction and control over the employees;
- (2) the party bearing the burden of remuneration;
- (3) the party imposing discipline;
- (4) the party hiring the employees;
- (5) the party with authority to dismiss the employees;
- (6) the party who is perceived to be the employer by the employees; and
- (7) the existence of an intention to create the relationship of employer and employee.

(See, for example, *Windsor Airline Limousine Services Limited*, [1981] OLRB Rep. March 398; *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538; *Toronto Arts Productions*, [1980] OLRB Rep. Sept. 1556; and *The Tower Company (1961) Ltd.*, [1979] OLRB Rep. June 583; and the numerous authorities cited therein.) The cases have generally not assigned any particular order of priority to those factors, but rather have tended to indicate that the weight to be given to each factor must depend upon the facts of each case. However, the Board has tended to attach considerable significance to "overriding control" in determining which of two or more entities is the employer of certain persons. Moreover, the Board has consistently found that neither private arrangements as to who is the employer, nor administrative paymaster arrangements, are indicative of the true employer.

38. In the present case the respondent exercises a high degree of control over the workers in question. The respondent's supervisors not only tell them what tasks they are to perform, but also direct them in the manner in which they are to be performed. It is the respondent which determines what hours will be worked by those workers at its premises, when they will take their breaks, and when they will eat lunch. Although the particular workers to be assigned to the respondent's premises are initially determined by the various employment agencies as the respondent's agents, it is the respondent which makes the ultimate determination concerning whether an individual will be permitted to continue to work at the Centre or will be discontinued or replaced. Thus, the respondent exercises substantial control over those workers, similar in many respects to the control which it exercises over regular full-time K Mart employees. Although the agencies serve as paymasters for K Mart in respect of the workers which they supply to the Centre, it is the respondent that bears the ultimate burden of their remuneration; as indicated above, after paying the workers, the agencies immediately invoice K Mart for each hour of work performed by them at the Centre. The evidence concerning imposition of disci-

pline is of little assistance to the Board in resolving this matter since little or no disciplinary action is taken against any of the employees in question by either the respondent or the agencies. Instead of using any form of progressive discipline, the respondent simply removes any unsatisfactory agency worker from the Centre through a direction that the agency cease referring that person to the respondent's premises. That removal is tantamount to a discharge vis-a-vis the respondent, although the individual in question may thereafter be assigned by the agency to provide services to another client. Thus, the respondent clearly has the authority to direct that any of the employees in question cease working at its premises.

39. Although neither of the two agency workers who testified before the Board identified the respondent as their employer, their signatures on the grievance provide some indication that their perception in that regard is not unequivocal. Moreover, the perception of the employees is but one of the factors to be considered and is not conclusive [see *Re Seafarers' International Union of Canada and Kent Line Ltd.* (1972)], 27 D.L.R. (3d) 105 (Fed. C.A.)], particularly in a situation where an employer has structured its affairs in a manner which deliberately attempts to evade collective agreement obligations in respect of a substantial number of individuals performing bargaining unit work on its premises. Similar observations are applicable to the seventh criterion, i.e., the existence of an intention to create the relationship of employer and employee. On balance, we find that the respondent's intention was to create an arrangement [sic] whereby it could have all of the advantages of an employer-employee relationship without incurring the collective agreement obligations that apply to an employee in the context of a unionized operation such as the Centre. While its original intention of using temporary employees in peak periods to minimize layoffs among its regular full-time employees may not have been objectionable, the respondent's intention took on an anti-union aspect after the union duly obtained bargaining rights and the respondent directed virtually all of its increased work load to "temporary employees" whose numbers and length of service increased dramatically, thereby enabling it to avoid hiring regular full-time employees who would unquestionably be within the bargaining unit. Moreover, the respondent's reference to cost-saving is not a valid defence to its actions. It is common knowledge that unionization of a work place can have an economic impact on an employer's business. Indeed, it is the potential for increased remuneration which (at least in more prosperous economic times) constitutes [sic] one of the primary "selling points" of the union movement. In dealing with somewhat similar considerations in *Westinghouse Canada*, [1980] OLRB Rep. Apr. 577, the Board:

"63. The purpose of *The Labour Relations Act* is to provide a statutory framework within which employees are encouraged to join together and bargain collectively with their employer. The underlying assumption is that employees who bargain collectively are on a more equal footing with their employer than unorganized employees and have a greater say in determining their terms and conditions of employment. It is axiomatic, therefore, that collective bargaining as established under the Act has an economic impact in terms of both the price of labour and the scope of the employer's unilateral authority. Under our Act the employee's share of the economic pie and the scope of management's authority vis-a-vis employee relations must be determined at the bargaining table and against the backdrop of possible economic sanctions [sic] by either side. An employer whose employees have decided to bargain collectively cannot escape his obligations under *Labour Relations Act* and any decision taken to avoid these obligations or to defeat the legitimate collective bargaining aspirations of his employees is in violation of the Act. Under our statute accommodation is sought at the bargaining table. An employer who contracts out his work, relocates or closes his plant or takes any other major business decision to avoid having to deal with his employees collectively through a trade union or to avoid the possibility, in the abstract, of being subject to economic sanctions is guilty of an unfair labour practice and the Board has so found in a number of cases...."

40. This is not the first case in which the Board has been called upon to determine whether workers supplied to a company by an employment agency are employees of the agency or employees of the company. For example, in *The Welland County Board of Education*, [1972] OLRB Oct. 884, the Board found that certain secretaries who had been transferred by the School Board to the payroll of Office Overload, an existing employment agency, remained employees of the School Board for purposes of the *Labour Relations Act*. Similarly, in *Ralston Purina Canada Inc.*, [1979] OLRB Rep. June 552, the Board found that persons applied [sic] to

that company by International Personnel Ltd. were employees of the former on the basis of the following facts (set forth in paragraph 3 of the decision):

“Ralston Purina is party to a verbal agreement with International Personnel under which International Personnel assigns persons who are selected by Ralston Purina to work for Ralston Purina at a leased facility in Mississauga. International Personnel is responsible for paying these persons an hourly rate agreed to in negotiation with Ralston and for providing and administering the benefit plans covering these persons. The Unemployment Insurance premiums and Ontario Health Insurance Plan premiums are paid through International Personnel on behalf of these persons. International Personnel is paid a fee by Ralston which allows it to recoup its costs and to realize a profit. The persons supplied by International Personnel work for Ralston, are supervised by employees of Ralston and may be terminated by Ralston. The facility at which these persons work is a temporary facility. The company occupies a permanent facility in Mississauga for which the Grain Millers Union holds bargaining rights covering that specific location. The officials of Ralston were never of the view that the persons supplied by International Personnel to work as [sic] its temporary location were its employees.”

41. The issue of whether a personnel agency (“Manpower Business Services”) or its client (Templet Services) was the employer of “five or six persons” who were installing library shelving at a research centre came before the Board in *Templet Services*, [1974] OLRB Sept. 606. In that application for certification by Carpenters’ Local 93, the Board found the individuals in question to be employees of the agency. Although a number of the pertinent facts of that case are similar to those of the present case, it is distinguishable on the basis of the relative permanence of the relationship between a number of agency workers (including the grievors) and K Mart, the existence of bargaining unit employees who work side by side with agency workers performing identical tasks under common supervision and control and the anti-union animus which we find to have been a significant element in the respondent’s substantially expanded use of such workers at the Centre in 1981 and 1982.

42. There are also a number of arbitration awards which have found workers supplied to companies by employment agencies, under arrangements similar to those between K Mart and the agencies described above, to be employees of those companies for labour relation purposes. See, for example, *Re Regional Municipality of Waterloo and London and District Service Workers’ Union, Local 220* (1977), 16 L.A.C. (2d) 280 (Brandt); *Re Goodyear Tire & Rubber Co. of Canada Ltd. and United Rubber, Cork, Linoleum and Plastic Workers, Local 232* (1977), 16 L.A.C. (2d) 177 (Gorsky); *Re Board of Governors of Riverdale Hospital and Canadian Union of Public Employees, Local 79* (1974), 7 L.A.C. (2d) 40 (Shiff); and *International Association of Machinists and Philco Corp. of Canada Ltd.* (1963), 13 L.A.C. 291 (Hanrahan). (Cf. *Re City of Kelowna and Canadian Union of Public Employees, Local 38* (1980), 25 L.A.C. (2d) 314 (Larson), in which an arbitration board found that although workers obtained from an employment agency did not normally become employees of the City, the City had “an obligation to contract for them upon terms consonant with the collective agreement *mutatis mutandis*. See also *Re Ford Motor Co. of Canada Ltd. and Plant Guard Workers, Local 1958* (1981), 1 L.A.C. (3d) 141 (MacDowell), which contains a useful review of the pertinent arbitral and Board jurisprudence. In that case, the arbitrator found that security guards provided by a security service company remained employees of that company and did not become Ford employees since all of the indicia, except control, pointed to the security company as employer, and “control” presented a “mixed and equivocal” picture.)

43. Accordingly, having regard to all of the circumstances and the relevant jurisprudence, the Board finds that the grievors were at all material times employees of the respondent for purposes of the *Labour Relations Act*. We further find that at the time the grievance was filed, the grievors were bargaining unit employees under the collective agreement in that they were “employees of the [respondent] Company working at its distribution centre in Brampton, Ontario” and were not foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, or students employed during the school vacation period.

8. The K Mart case, *supra*, dealt with a number of matters beyond the “who is the

employer” issue, including alleged unfair labour practices. The Board herein is dealing solely with the question as to whether the four persons are employees of the respondent for purposes of the *Labour Relations Act*. Nonetheless, the Board regards the reasoning in the excerpt quoted above as persuasive and apposite to the instant case.

9. Two of the four persons were referred to the respondent through Kelly Temporary Services; the other two were referred through Manpower Temporary Services. The four are paid directly by their respective agencies although the respondent is apparently billed at an hourly rate by the agency for their services. In the Board’s view, it is the respondent which bears the ultimate burden of the workers’ remuneration notwithstanding that the agencies act as paymaster for administrative purposes. As in *K Mart, supra*, the Board herein finds that it is the respondent which exercises a high degree of control over the workers in question. The four are directed by the respondent’s supervisors as to their specific duties and the manner in which those duties are to be performed. The fact that the on-site training is not extensive does not undercut this factor as pointing to the respondent as employer. That the agency may show a general safety video and provide general WHMIS information does not alter the Board’s conclusion as to who exercises effective control over the persons in the work place. Again, as in *K Mart*, the evidence in this case indicates that the respondent determines whether the individual will continue to work at its premises. That is, the respondent may direct the agency to remove the individual and/or to replace that person and the agency would comply. Although the persons may be reassigned by the agency to another firm, the reality is that the respondent controls its “temporary” workforce in all crucial aspects, including discipline and discharge. Indeed, the Board heard evidence that, at least in one instance, the respondent directly disciplined one of the four persons in dispute. Pat Milancey testified that the respondent’s policy on lateness was applied to her. That is, the first time she clocked in one minute late was considered a “grace period” but on the second occasion she was docked fifteen minutes pay for arriving two minutes late.

10. Other of the factors referred to in *K Mart* include who is perceived to be the employer by the employees and the existence of an intention to create the relationship of employer and employee. As to the first point, the evidence here is somewhat equivocal. Only one of the four workers testified. She acknowledged candidly that Manpower Temporary Services told her that she was their “employee”. But she also testified that she felt she worked for the respondent. With respect to the intention to create an employer-employee relationship, the Board finds that, even if it is assumed that the respondent did not intend to create a situation where the individuals were their employees, the respondent so structured the circumstances in which the four performed their duties that it exercised overriding control over the persons in dispute. In this regard, the Board stresses that the anti-union animus context of *K Mart, supra*, is not applicable herein. That is, the conclusion that the respondent exercises such fundamental control is not grounded in anti-union motivation and such animus is not required to support such a finding of fundamental control.

11. The counsel for the respondent and the employee objectors stressed the facts that the persons in question were not issued company uniforms, did not attend regular meetings and, with one exception, were not invited to the Christmas party. However, the Board regards these aspects as peripheral to the basic issue as to who exercises overriding control over the workplace activities of the four. Moreover, it appears that full company uniforms were not issued to “regular” employees until after completion of the probationary period. Thus, this factor does not unequivocally distinguish the “temporary” from the “regular” workers.

12. The Board does not intend to go into further detail with respect to the evidence. Only those matters considered particularly relevant have been set out. On balance, and having weighed all the evidence, in the context of the parties’ submissions and the jurisprudence, the Board finds

that the four persons in dispute are employees of the respondent for purposes of the *Labour Relations Act*. Given the parties' agreement that the four performed bargaining unit work on the application date, the four persons are to be included in the bargaining unit for purposes of the count.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 4, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A statement of desire (petition) in opposition to the application was filed with the Board. Given the overlap between the persons signing the petition and those who previously signed membership cards in support of the applicant, the Board will inquire into the voluntariness of the petition. In this regard, the Board notes the applicant's position challenging the voluntariness of the petition.

15. The Board notes as well that revocations or reaffirmations of support for the applicant were also filed. However, the overlap between those persons signing the revocations and those who previously signed the petition is not sufficient to cause the Board to inquire into the voluntariness of the revocations.

16. Accordingly, the Board directs the Registrar to schedule this application for hearing to determine the voluntariness of the petition. This panel is not seized.

1714-90-R The Society of Ontario Hydro Professional and Administrative Employees, Applicant v. Ontario Hydro, Respondent

Certification - Pre-Hearing Vote - Union's earlier 1986 certification application subject of numerous Board and court proceedings not yet concluded - Earlier application still outstanding - Union making new certification application and requesting pre-hearing vote - Employer and intervener arguing that vote should not be ordered for various reasons, including fact that previous application remains outstanding - Whether section 103(3) of the Act affecting Board's jurisdiction to order vote - Pre-hearing vote and vote with respect to professional engineers' wishes ordered - Outstanding issues to be addressed at hearing following vote

BEFORE: Owen V. Gray, Vice-Chair, and Board Members G. O. Shamanski and B. L. Armstrong.

DECISION OF OWEN V. GRAY, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG;
January 31, 1991

1. This is an application for certification in which the applicant ("the Society") has asked the Board to conduct a pre-hearing vote. That request is opposed by the respondent ("Hydro") and a group of affected employees who refer to themselves (as we will for the purpose of this decision) as The Coalition to Stop the Certification of the Society ("the Coalition"). This decision deals with the question whether the Board will conduct such a vote under section 9(2) of the

Labour Relations Act ("the Act") in connection with this application. That question arises against a background of previous proceedings which we shall first briefly describe.

Background

2. Hydro and the Society for some years engaged in a form of collective negotiations which they treated as taking place in the context of a "voluntary relationship" outside the ambit of the *Labour Relations Act*. On November 5, 1986, the Society filed an application for certification as exclusive bargaining agent of the group of Hydro employees ("Society represented employees") it had been representing in that "voluntary relationship." It requested that a pre-hearing representation vote be conducted.

3. When that first application was filed, Ontario Hydro ("Hydro") and the Society were parties (as they apparently still are) to a "Master Agreement" and a number of subsidiary agreements which addressed the terms and conditions of employment of a unit of employees for whom Hydro recognized the Society as the "representative body". On March 27, 1987, at the conclusion of the show-cause hearing ordered in a decision reported at *Ontario Hydro*, [1987] OLRB Rep. Mar. 419, ("*Hydro #1*"), we decided not to conduct a pre-hearing representation vote, for reasons later reduced to writing and reported at [1987] OLRB Rep. Dec. 1589 ("*Hydro #2*").

4. The first issue dealt with on the merits in that application was whether certain "Society represented" employees fall within federal jurisdiction for labour relations purposes and could not, therefore, be included in any bargaining unit for which the society might be certified by this Board. That issue had been raised by the Coalition, whose role in those proceedings as representative of objecting employees was described in paragraph 3 of our decision of February 25, 1988, which is reported at [1988] OLRB Rep. Feb. 187 ("*Hydro #3*"). In that decision we concluded that some of Hydro's facilities fall within the ambit of the declaration in section 17 of the *Atomic Energy Control Act*, so that Hydro's relations with those it employs on or in connection with any such facilities (the nuclear reactors in its nuclear generating stations, for example) fall under federal jurisdiction for labour relations purposes.

5. Hydro and others applied for judicial review of our constitutional determination in *Hydro #3*. On June 12, 1989, the Ontario Divisional Court decided that the Ontario Act, and not the federal Labour Code, applies to Hydro's "nuclear employees" who are not otherwise exempt from its provisions: *Re Ontario Hydro and Ontario Labour Relations Board et al.* (1989), 69 O.R. (2d) 268. The Attorney-General of Canada was later granted leave to appeal from that decision, and the appeal was argued before the Ontario Court of Appeal in early September 1990. The court's decision issued on January 28, 1991. By a majority, the court allowed the appeal and set aside the Divisional Court's decision, affirming our initial assessment of the constitutional issue. We are mindful of the possibility of a further appeal to the Supreme Court of Canada.

6. The first application raised a number of other issues that had to be resolved whether or not some of the affected employees fell within federal jurisdiction. These were described at length in *Ontario Hydro*, [1989] OLRB Rep. Feb. 185, 1 C.L.R.B.R. (2d) 161 ("*Hydro #4*"). The most substantial and pervasive of the several major issues was whether, as Hydro has long claimed, a great number of the persons represented by and forming the membership of the Society exercised managerial functions within the meaning of clause 1(3)(b) of the Act in connection with the employment either of other persons represented by the Society or of Hydro employees for which Canadian Union of Public Employees - C.L.C. Ontario Hydro Employee Union Local 1000 ("OHEU") and other trade unions hold bargaining rights. Persons to whom subparagraph 1(3)(b) of the Act applies would not be included in any bargaining unit for which the applicant could be certified under the Act. Moreover, Hydro asserted that the Society could not be a "trade union" if

its membership included managerial persons and that their participation in its activities and the Society's having enjoyed the fruits of the "voluntary relationship" disentitled it to certification under section 13 of the Act and cast doubt on the membership evidence it had submitted in support of its application. Hydro's position on those and other issues was supported by the Coalition.

7. We began by addressing the questions whether the society was a trade union and whether it had received employer support within the meaning of section 13 of the Act. After lengthy hearings on those issues, we concluded that the applicant was a trade union within the meaning of clauses 1(1)(p) of the Act even if, as we assumed for the purpose of assessing Hydro's argument to the contrary, its membership included managerial persons as alleged by Hydro: *Hydro #4, supra*. We also concluded that the applicant had not been the recipient of employer support within the meaning of section 13 of the Act. We came to those conclusions without answering the question whether the applicant's agreements with Hydro constituted a collective agreement: *Hydro #4, supra*, paragraphs 95 to 97.

8. At the next stage in those proceedings, the parties and the Board began dealing with the challenges under clause 1(3)(b) of the Act. While that process was going on, the Society filed an application under section 44 and a complaint under section 89. Both squarely raised the question whether the agreements it had made with Hydro in its previous representational role together constituted a "collective agreement" within the meaning of clause 1(1)(e) of the Act. Hydro and the Coalition argued that the agreements did not constitute a "collective agreement" to which the Act applied. They also argued that the applicant was estopped from asserting otherwise. This panel heard the application and complaint. We found that the Society was estopped from asserting that its agreements with Hydro constituted a "collective agreement" to which the Act applied: *Ontario Hydro*, [1990] OLRB Rep. Mar. 305, 7 CLRBR (2d) 161. The Society has applied for judicial review of that decision. Its application has not yet been heard by the Divisional Court.

9. In late April 1990, the Society applied for reconsideration of our 1987 decision denying its request that a pre-hearing vote be conducted. This panel heard that application in late June 1990. That month, a somewhat differently constituted panel also heard argument concerning roughly 40 of the 3100 individuals whose employee status as of the November 5, 1986 application date was in issue with reference to clause 1(3)(b) of the Act. Decisions had not issued in those particular matters by late September 1990, when the Board was advised that the instant application was being filed. Upon being so advised, the panels ceased work on their decisions pending clarification of the intentions of the applicant.

10. The Society has not withdrawn its first certification application. Its stated reason for this is a concern that the Court of Appeal not lose or decline jurisdiction to pronounce on the constitutional issue argued before it in September 1990 as a result of a withdrawal of the application in which that issue arose. It asserts without contradiction that all parties to the judicial review proceedings were in sympathy with the view that the Court of Appeal should be urged to pronounce on that issue even though the Society does not intend to pursue its first application and that that application should not be formally withdrawn lest the Court consider itself deprived of jurisdiction. We do not know what its intentions now are as a result of the release by that court of its decision.

11. This is an appropriate point to make some observations about the way matters developed in the first application.

12. We declined to direct that a pre-hearing representation vote be conducted when that was first requested because, after asking the parties to assist us in that regard at the show cause hearing, we could not foresee any outcome of that application in which the Society could be found to be a trade union free of employer support without the existing agreements also constituting col-

lective agreements which gave it the bargaining rights it purported to seek. There is a subtle but important distinction between saying that the applicant's agreements with Hydro do not constitute a collective agreement to which the Act applies and saying that the applicant is estopped from claiming otherwise. At this point in time we cannot say whether the estoppel argument which we heard in 1989 was somehow implicit in something someone said at the show cause hearing in 1987. We do not remember its having been expressly identified. Not having then heard the detailed evidence we later heard about the dealings between Hydro and The Society over the years, we did not anticipate an estoppel argument distinct from an argument about whether their agreements constituted a collective agreement as a matter of law. When we made our decision not to direct the conduct of a pre-hearing vote, we did not entertain the possibility that the collective agreement issue might unfold as it later did. It should be apparent from our decisions in *Hydro #1* and *Hydro #2* that had we then seen that as a possibility, we would have directed that a pre-hearing vote be conducted notwithstanding all the other arguments which were then made against our so doing.

13. After the initial decision not to conduct a pre-hearing vote, the 1986 application proceeded as an "ordinary" application. That meant that before there could be any question of conducting a representation vote under section 7, the Board had to determine the composition of the bargaining unit and determine whether the requisite percentage of those employed in that unit *on the application date* were members of The Society on that date. That would require a substantial number of decisions about whether particular individuals were exercising managerial functions within the meaning of clause 1(3)(b) of the Act *as of November 5, 1986*. Those determinations threatened to occupy quite some time, particularly since the parties seemed unable to agree that any one of the more than 3000 individuals in dispute performed functions sufficiently similar to those of any others that the status of groups of challenged individuals could be determined by determining the status of one member of each group.

14. If the result of that exercise ultimately showed that on the application date the Society had the requisite membership support, a vote might have been ordered. In the period of years from the application date to that point, there would have been changes in the duties, responsibilities and incumbents of the positions originally in dispute. Eligibility to participate in the vote would again turn on employee status with reference to clause 1(3)(b) as of the time the vote was ordered and taken. Absent some substantial change in the parties' willingness to settle or narrow the issues, there would then have been a second set of lengthy proceedings directed to the application of clause 1(3)(b) to circumstances existing several years after the first determinations.

15. As counsel for the Society has noted in his submissions, during our hearings on the first application we more than once urged the parties to find ways to reduce the range and number of issues that had to be adjudicated before the wishes of those employees who are covered by the Act could finally be ascertained and acted upon. One of the observations we made was that determinations of the clause 1(3)(b) issues as of November 5, 1986 might be increasingly academic to the parties for any purpose other than the threshold question of percentage membership support, and would certainly be increasingly difficult to make on the basis of evidence given years after the relevant time. At at least one point we did offer the parties the observation that the filing of a new application would shift the focus of the issues under clause 1(3)(b) to a contemporary date and alleviate some of the difficulties which the passage of time had created.

The Issue To Be Dealt With In This Decision

16. Section 9 of the Act provides as follows:

9.-(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under subsection 7(2).

17. In *Hydro #2, supra*, we made some observations about the nature of the question with which we have to deal at this stage in an application of this sort. Those observations bear repeating:

4. The Board's response under subsection 9(2) to a request that a pre-hearing vote be conducted involves a decision about procedure, not substance. The procedural question is whether to gather up additional information about the wishes of employees to be represented by the applicant. The employees whose wishes would be tested in this way collectively constitute one or more voting constituencies, which may very well not be coextensive with the bargaining unit or units ultimately found appropriate by the board. The voting procedure can be designed to ensure that a vote of employees in that bargaining unit or units can, in effect, be retrospectively reconstructed from ballots cast by persons in the voting constituency or constituencies. The Board's discretion in defining a voting constituency is fettered only by its own assessment of the possible utility of a pre-hearing vote conducted in that constituency. If it appears to the Board that not less than 35 per cent of the employees in a voting constituency were members of the applicant at the time the application was made, the Board may conduct such a vote *before* entertaining the representations and evidence of the parties and other interested persons with respect to matters relevant to the disposition of the application and *before* determining whether and to what extent the results of that vote could or should be relied upon in dealing with the application.

18. In a similar vein, this panel made the following observations in *Taiga Trucking (Ontario) 1980 Inc.*, [1987] OLRB Rep. Nov. 1433:

5. Our function at this stage is to make the determinations contemplated by subsection 9(2) of the Act. We do not determine the appropriate bargaining unit or assess the weight to be given to the applicant's membership evidence. As appears from subsection 9(4) of the Act, those matters are only decided after the vote is conducted, when all interested persons will be notified in Form 71 of the contents of the Returning Officer's report and of their opportunity to make representations and have a hearing before the Board with respect to any issue affecting the certification application or the pre-hearing representation vote. Indeed, at this stage the Board does not attempt to resolve any dispute about its constitutional jurisdiction (*Kenting Earth Sciences Limited*, [1985] OLRB Rep. Feb. 293) or the applicant's "trade union status" (*Emery Industries Limited, supra*) or the identity of persons employed in any proposed bargaining unit at any relevant time (*The Board of Education for the City of North York*, [1984] OLRB Rep. July 989), or the application of subsection 1(4) of the Act (*Satin Finish Hardwood Flooring (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602). These and any other issues affecting whether and how the results of a pre-hearing vote should affect the disposition of the application for certification are only resolved *after* any such vote is conducted.

6. While we do not resolve such issues at this stage, we do need to know the immediate parties' positions on any issue which could affect the use to which the results of a pre-hearing representation vote may later be put. This is so that a meaningful voting constituency or constituencies can be struck and appropriate directions made concerning segregation of ballots cast by individ-

uals or groups whose inclusion in or exclusion from the appropriate unit or units is in dispute. A pre-hearing vote is of little use unless one can later reconstruct from it a vote of the employees in the unit ultimately found appropriate by the Board. Accordingly, when an applicant requests a pre-hearing vote, the Board's practice is to authorize one of its Labour Relations Officers to examine the records of the applicant and of the respondent and to confer with the parties as to the description and composition of the appropriate bargaining unit, the description and composition of the voting constituency or constituencies, the list of employees as of the terminal date for the purposes of any vote which might be directed and all other matters relating to entitlement to and arrangements for such a vote, and to report to the Board thereon.

(See also *McDonnell-Ronald Limousine Service Limited operating as - Airline Limousine*, [1988] OLRB Rep. Nov. 1135 at paragraph 5.)

19. In accordance with the practice described in the passage just quoted, a Labour Relations Officer was appointed and met with representatives of the applicant, the respondent, the Coalition and OHEU which represents an existing bargaining unit of employee of the respondent. When making the determinations set out in this decision we had before us the report of that Labour Relations Officer dated January 11, 1991 and its appendices, the documents referred to later under the heading Appearance of Membership, letters of January 8, 9, 16 and 29, 1991 from counsel for the applicant, letters of December 28, 1990 and January 17, 1991 from counsel for the respondent, letters dated January 16 and 29, 1991 from Stewart Crampton, "Chairman, The Coalition" and a letter of January 17, 1991 from counsel for OHEU.

20. There are three questions to be addressed in connection with subsection 9(2) of the Act:

(1) what should be the voting constituency for a vote if one is ordered?

(2) does it appear from the records of the applicant and the respondent that at least 35 percent of those employed in that voting constituency on the application date were members of the applicant?

(3) if the answer to the second question is "yes", is there some reason why a vote should not be conducted?

The policy reasons for framing the third question as we have will be elaborated when we get to that question in the course of this decision.

Voting Constituency

21. When the participants in an officer's pre-vote meeting can agree on the description of the appropriate bargaining unit, the voting constituency is usually described the same way. When there is a disagreement about this "composition" issue - when, in other words, the participants in the officer's meeting disagree about what sorts of employees fall within the appropriate unit - then the best voting constituency for a pre-hearing vote is one which includes every sort of employee whom anyone thinks will fall within the appropriate bargaining unit. If that "all inclusive" voting constituency passes the "appearance" test, it is generally the one used. When a vote is conducted in those circumstances, the ballots of (at least) every sort of employee who anyone thinks will *not* fall in the bargaining unit are segregated and not counted pending determination of the issues in dispute: *Carleton Roman Catholic Separate School Board*, [1986] OLRB Rep. Sept. 1200 at paragraph 8.

22. Here the parties disagree about the composition of the appropriate unit. It is apparent that the applicant's description of what it says is the appropriate bargaining unit would encompass everyone who would fall within the narrower bargaining units proposed by Hydro and the Coali-

tion. That is the “all inclusive” voting constituency here. In view of the many controversies over both the description of the appropriate bargaining unit and the list of those employed in it on the application date, all ballots cast in any vote in this voting constituency would be segregated and sealed pending determination of matters in dispute.

Appearance of Membership

23. As appears from subsection 9(4) of the Act, after a pre-hearing vote is conducted the Board must determine at least two things: the composition of the appropriate bargaining unit and whether at least 35 percent of the employees in that unit on the application date were members of the applicant. If this threshold membership requirement is satisfied, a vote of the bargaining unit reconstructed from ballots cast in the pre-hearing vote may be given the same effect as a vote directed under subsection 7(2) of the Act. It should be noted that this threshold test focuses on whether a minimum number of those in the unit were members of the applicant organization in fact and law. It does not address the actual desire of the members to be represented by the applicant in collective bargaining; that is the obvious function of the vote.

24. At the post-vote stage contemplated by subsection 9(4), the Board must be “satisfied” that the requisite percentage were members, which is the same test (although the percentages are different) as applies under section 7 in an “ordinary” application. Whatever the results of a pre-

hearing vote, a trade union cannot be certified unless it afterwards discharges this onus of satisfying the Board with respect to its evidence of membership. Under section 72 of the Board’s Rules of Procedure, that evidence must be in writing and signed by the employee and must be filed by the terminal date for the application. Having regard to clause 1(1)(l) of the Act, the documents must purport to show either that the employee is actually a member of the trade union or that the employee has applied for membership in the trade union and has paid to it at least one dollar in respect of initiation fees or monthly dues.

25. The Board does not have to be “satisfied” with an applicant’s documentary membership evidence before ordering a pre-hearing vote. It need only find that “it appears” that at least 35 percent of those in the voting constituency at the time of the application were members of the trade union. Having regard to the language of subsection 9(2), this appearance is to be assessed by looking at records of the employer and the union.

26. Hydro’s records were reviewed during the officer’s meeting. The parties prepared a list (“the list”) of everyone who anyone said was in the unit sought by the applicant. There are 8019 names on that list. Hydro says 3610 of these would not be in the bargaining unit in its view. It alleges 3306 of those exercise managerial functions and 114 are employed in a confidential capacity within the meaning of clause 1(3)(b). The others are challenged as being in categories Hydro says should be excluded from the bargaining unit on community of interest grounds: 22 in the New Business Ventures Division (of which an unidentified number are also challenged under clause 1(3)(b)), 4 in the Law Division, 3 in Corporate Security, and 124 temporary, 19 part-time and 18 student employees. The Coalition says the Research Division should be excluded on community of interest grounds. 304 individuals are challenged on that basis, 96 of whom are also challenged by Hydro and OHEU on other grounds. OHEU says that 683 of those on this list belong in its bargaining unit; 476 of those are also challenged by Hydro and the Coalition on other grounds.

27. The applicant relies in this application on the documentary evidence it filed in November 1986 in connection with its earlier application for certification. That evidence came in two forms. One is a combination application for membership and receipt and acknowledgement of payment of \$5.00 towards the first month’s membership fee. The other form is a certificate which is

signed by the employee confirming that he or she was a member. Each certificate is also signed by an officer of the applicant confirming both that the individual was a member and that the member had paid "the Society fees" for a specified period of months prior to the date of the certificate. As might be expected, a number of the documents filed in 1986 relate to persons who are not on the list.

28. The applicant has filed additional documentation in connection with this application. That documentation includes four boxes full of applications for membership on a form which does not include a receipt or acknowledgement of actual payment to the applicant. The precise wording of these applications for membership varies according to when they were signed. Some are more than 20 years old. Some are dated well after the 1986 application. More than 4200 of these newly-filed documents appear to be signed by persons on the list.

29. In addition, the applicant has filed documents ("dues lists") said to be lists periodically generated by Hydro during the 12 month period prior to the filing of this application, showing amounts deducted by it from named employees' salaries and remitted to the applicant on account of the employees' membership fees. Over 4500 of names on these documents correspond to names on the list. Over 4000 of those names correspond with names on the applications referred to in the previous paragraph, over 250 correspond with names on combination application and receipt cards filled in 1986 and over 2000 correspond with names on certificates filed in 1986. There are many cases in which more than one document has been filed with respect to an individual. The applicant has also filed copies of receipts with respect to membership fees issued to a small number of members who pay their fees directly rather than through payroll deductions.

30. The respondent and the Coalition argue that much of the membership evidence is unreliable because of its age and the circumstances in which it was obtained. Those are matters which are addressed at hearing after any pre-hearing vote is conducted. The appearance test which applies at this stage is satisfied if the documentary evidence filed by the applicant trade union would establish the requisite level of membership if the assertions in the documents and by the applicant are true.

31. On their face, the combination application and receipt cards filed in 1986 are evidence of an application for membership and payment. Each newly filed application for membership which is signed by someone whose name appears on one of the aforementioned dues lists or receipts also arguably meets the requirements of clause 1(1)(1). It therefore appears, from the records of the applicant and respondent, that at least 35 percent of those employed in the voting constituency were members of the applicant on the application date.

Exercise of Discretion

32. The use of the word "may" in subsection 9(2) gives the Board a discretion not to conduct a pre-hearing vote even when the prerequisites are met. Hydro and the Coalition argue that we should exercise that discretion against the applicant. Their many submissions in this regard have these basic themes:

(1) there should not be a vote because there is an earlier outstanding application;

(2) there should be no pre-hearing vote because there is in their view a substantial chance that the application will fail no matter what the result of the vote may be;

(3) there should be no vote before the bargaining unit issues are dealt with because voters do not know how many Society represented persons are employees to whom the Act applies, do not know whether such employees will ultimately be included in one bargaining unit or two and in a great many cases do not know whether they would be included in any bargaining unit if the applicant wins;

(4) there should be no vote before the managerial challenges are dealt with because active participation of challenged individuals may adversely affect the results if it is later determined they are managerial.

33. The Board's discretion under subsection 9(2) must be exercised with regard to the purpose of the provision for pre-hearing votes. That purpose was described this way in *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316:

5. It is axiomatic that in labour relations matters "time is of the essence"; but this is especially the case in respect of representation votes. If the trade union's certification application, and its status as bargaining agent, are not resolved expeditiously (i.e., if it cannot engage in collective bargaining, or perform the other representational functions for which it was selected) there may be discontent among its supporters and a possible erosion of that support. This might not only make the union's certification more difficult, but could also complicate its collective bargaining task. The purpose of the pre-hearing, or "quick vote" procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute.

34. We repeat the observations we made in *Hydro #2*:

3. A quick vote will be a totally illusive ideal except in the most trivially simple of cases if the trade union status of the applicant, the description or composition of the appropriate bargaining unit, the list of persons employed in that unit on the application date, the qualitative and quantitative sufficiency of evidence of membership or any other issue of substance must be adjudicated before the vote is conducted. The provisions of section 9 recognize this. By describing the vote contemplated by section 9 as a "pre-hearing" vote, the Legislature recognized that the Board must be able to decide whether to conduct such a vote without having first to decide any issue in respect of which any person has the right to prior notice and the opportunity of a hearing. As the Board observed in *Kenting Earth Sciences Limited*, [1985] OLRB Rep. Feb. 292 at paragraph 8:

... A "pre-hearing representation vote" is precisely that: a vote conducted before any hearing is held to determine whether and to what extent the result of that vote should affect the rights of the parties. The Board has repeatedly noted that the expedition contemplated and intended by section 9 of the *Labour Relations Act* would be lost if the vote had to await formal adjudication of some contested issue in the guise of a preliminary matter: *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989; *Satin Finish Hardwood Flooring (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602, and the decisions cited therein. A hearing is conducted after the vote to determine whether effect should be given to the result.

...

5. Except in very simple cases, there will always be some risk that no use can ultimately be made of the results of a particular pre-hearing representation vote. Against that risk must be balanced the potential benefit of the quick vote, both in the case at hand and for the certification process

generally. In the Board's view, the purpose described in the preamble to the Act is best served by making the section 9 quick vote procedure a real and workable option in the widest possible range of cases. As a matter of policy, the Board will not be quick to conclude that a pre-hearing vote should not be conducted because of a risk, however real, that no use could ultimately be made of the results. *Generally, the Board would rather conduct a pre-hearing vote which might later prove useless than fail to conduct a pre-hearing vote which might have been useful.*

[emphasis added]

35. By way of amplification of our earlier reference to the benefit of the quick vote for the certification process generally, we adopt the observations in *Goldcrest Furniture Ltd.*, [1989] OLRB Rep. Apr. 355 at paragraph 12, which refer to the classic management arguments in favour of "a vote in every case":

12. Whether certification decisions should be based on membership evidence or on the results of a representation vote is a matter of perennial debate: see Weiler, *Reconcilable Differences* (1980) at pages 37 to 49; Weiler, *Promises To Keep: Securing Workers' Rights To Self-Organization Under The NLRA*, 96 Harv. L. Rev. 1769 (1983). The response to this debate in some jurisdictions has been to require representation votes in every case but conduct them as soon as possible after the application is filed, before hearing the application on the merits; see Christie, *Certification: Is There A Better Way To Test Employee Wishes?*, in *The Direction of Labour Policy in Canada* 47 (F. Bairstow ed. 1977). That has not been the response in Ontario. Membership evidence is the primary basis on which certification applications are determined in "ordinary" applications under section 7 of the *Labour Relations Act*. The section 9 "quick vote" is, however, an option which a trade union can request when it applies for certification. If certifications based on representation votes are more palatable to employers and from their perspective provide a better foundation for collective bargaining than those based on membership evidence, then it is obviously in the interests of harmonious labour relations that the quick vote option be exercised as often as possible. Trade unions will be reluctant to exercise that option if the processing of the application through to and including the conduct of the vote can be delayed by an opposing party's raising an argument which, if successful, would result in the dismissal of the application.

(See also *U-Need-A-Cab Limited*, [1989] OLRB Rep. Mar. 301 at paragraph 5.)

36. With the exception of submissions based on the fact that the previous application remains outstanding, the arguments of the respondent and the Coalition against conducting a pre-hearing vote are repetitions, elaborations and variations on arguments made to and rejected by us in the earlier application: see *Hydro #1* and *Hydro #2*, *supra*. Intervening changes of circumstance, including the introduction of the constitutional issue, do not dissuade us from the views we then expressed. Again, we denied the applicant a pre-hearing vote at that time only because we were not shown how there was any real possibility that the result of a vote in a certification application could have a real effect on the applicant's legal rights. Having regard to the estoppel argument later made to and accepted by us, it is now apparent that the result of a vote in a certification application could have a real effect on the applicant's legal rights. That will be so if the Society's application for judicial review of our decision on the estoppel issue is denied. That possibility is sufficiently real for these purposes.

37. It cannot be repeated too often that at this stage we are not determining or pre-judging the merits of the many issues raised by the parties. It is in the nature of a pre-hearing vote that it is conducted before there is a hearing to resolve the issues in dispute and decide whether any use can be made of the results of that vote. The parties' submissions do not persuade us that there is no outcome of the issues raised in which use could be made of the results of a vote conducted now. There is no reason for according any of the issues raised a special significance which removes it from the ambit of a legislative scheme which specifically provides for a resolution of disputed issues after a vote is conducted: *Emery Industries Limited*, *supra*, at paragraph 11.

38. The same may be said about the issues raised about the earlier application which remains outstanding. The effect of a prior application on the Board's willingness to entertain a subsequent one is an issue which can only be resolved after a hearing. The existence of such an issue is not something which has caused the Board to refuse to direct a pre-hearing representation vote: *The Corporation of the City of Gloucester*, [1989] OLRB Apr. 352. While that is enough to dispose of that argument for these purposes, some further comment is in order.

39. We take the Society at its word that it has decided not to pursue the first application and did not withdraw it only because it shared a common concern that the Court of Appeal not lose or decline jurisdiction to deal with the constitutional issue. We are puzzled by the position taken by Hydro's labour counsel, which seems to be that the Society ought to be forced to pursue an application it has decided to abandon. It is not apparent from the submissions before us where counsel suggests the Board will find the jurisdiction to do that. The customary response to a request to withdraw made at the stage the first application had reached is to dismiss the application. That application had not reached the stage at which dismissal with a bar would ordinarily have seemed the appropriate response to a request for leave to withdraw: see *Armacord Carpenters Ltd.*, [1989] OLRB Rep. June 531. Had the Society sought to withdrawn the application, the fact such a request was pending and opposed would not have been sufficient reason to deny a pre-hearing vote in this application: *The Corporation of the City of Gloucester*, *supra*. The fact that the request to withdraw has not yet been made should not alter the result, in our view.

40. Although it does not appear to have been raised in the parties' submissions concerning the previous outstanding application, we have considered whether subsection 103(3) of the Act affects our jurisdiction to direct that a pre-hearing representation vote be conducted. Subsection 103(3) provides:

103.- (3) Notwithstanding sections 5 and 57, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for such certification or for such a declaration is made with respect to any of the employees affected by the original application, the Board may,

- (a) treat the subsequent application as having been made on the date of the making of the original application;
- (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
- (c) refuse to entertain the subsequent application.

We think it does not, bearing in mind that the conduct of a pre-hearing vote is a procedural step taken in the pre-hearing processing of an application and does not involve the determination of any substantive issue on the merits. In that regard, we adopt the reasoning set out in *U-Need-A-Cab Limited*, [1989] OLRB Rep. Mar. 301 at paragraph 3. Having said that, we do note the assertion of counsel for the Society in his letter of October 9, 1990 to the Registrar of the Court of Appeal that "[t]he Society shall not seek leave of the Board to withdraw the application until the replacement application is finalized." If "finalized" means "decided", the applicant would be well advised to consider the effect of subsection 103(3), because the Board will certainly have to do so when hearings commence.

41. The prerequisites to conducting a pre-hearing vote exist here, and we see no reason not to do so. We say that recognizing the risk that no use might be made of the results of the vote if certain of the arguments of Hydro and the Coalition are ultimately accepted. Bearing in mind our labour relations function, it should perhaps be noted that by conducting a pre-hearing vote we reduce the risk that the 1(3)(b) issue has to be dealt with more than once in the course of determining whose wishes count and what those wishes are. That is certainly a desirable goal.

Representation Vote

42. Accordingly, we direct that a pre-hearing representation vote be conducted among employees in the following voting constituency:

All employees of the Respondent employed in the province of Ontario as professional engineers, engineers, engineers-in-training, scientists, professional, administrative and associated employees save and except persons included on the Executive Salary Payroll and above, and persons in any bargaining unit for which any trade union held bargaining rights as of October 2, 1990.

For purposes of clarity, the Notice of Taking of Vote should add this clarity note:

The voting constituency set out above describes employees whose *functions* are included in the classifications more particularly identified in the recognition clauses in the Master Agreement between the parties effective July 1, 1983, and, as subsequently amended to the application date. The voting constituency includes part-time, temporary and student employees and nurses.

Those employed in that voting constituency on October 26, 1990 who are so employed when the vote is conducted will be eligible to vote.

43. The question usually asked on a ballot where there is one applicant and no incumbent is "In your employment relations with [name of employer] do you wish to be represented by [name of applicant]?", with "Yes" and "No" as the options. The Coalition suggests that the question on the ballot be worded differently so as to drive it home to voters that this is a vote about representation under the *Labour Relations Act*. The Society opposes that suggestion. This is not a point on which conflicting views can be accommodated in the design of a vote. When such points arise, the applicant trade union's proposal will be followed if it is not too far-fetched; that way, the applicant has no-one but itself to blame if the vote is discarded because the approach it advocated was later shown to be inappropriate. It is not far-fetched to use the usual wording. It will be open to the Coalition to present evidence and argument after the vote to show that voters would not have understood what was going on despite the Board's Notices of Taking of Vote and the history of the Society's attempt to have the *Labour Relations Act* apply to its dealings with Hydro on behalf of "Society represented" employees.

44. Accordingly, voters will be asked whether or not they wish to be represented by the applicant in their employment relations with the respondent. Every person claiming to be eligible will be permitted to mark a ballot. All ballots will be segregated and sealed pending further order of the Board.

Engineers' Vote

45. The units proposed by the Society, Hydro and the Coalition all include professional engineers with employees who are not professional engineers. Subsection 6(4) of the Act provides that

6. (4) A bargaining unit consisting solely of professional engineers shall be deemed by the Board to be a unit of employees appropriate for collective bargaining, but, the Board may include professional engineers in a bargaining unit with other employees if the Board is satisfied that a majority of such professional engineers wish to be included in such bargaining unit.

“Professional engineer” is defined in clause 1(1)(n) of the Act:

“professional engineer” means an employee who is a member of the engineering profession entitled to practice in Ontario and employed in a professional capacity.

46. In conjunction with the conduct of the pre-hearing representation vote, we propose to conduct a vote of professional engineers employed by Hydro in which they will be asked whether they wish to be included with employees who are not in a single unit for the purpose of collective bargaining. The voting constituency for this vote will be

all professional engineers employed by Ontario Hydro in the Province of Ontario, save and except those persons on the Executive Salary Payroll and above, and persons in any bargaining unit for which any trade union held bargaining rights as of October 2, 1990.

In this description, “professional engineer” has the meaning assigned to it by clause 1(1)(n) of the Act. The Notice of Taking of Vote should add clause 1(1)(n) of the Act as a clarity note. All those employed in that voting constituency on the date the vote is taken will be eligible to vote. Since the parties disagree about who the professional engineers are and what qualifications they should have in order to count as a professional engineer, anyone claiming to be a professional engineer within the meaning of clause 1(1)(n) of the Act will be permitted to mark a ballot and all such ballots will be segregated and sealed pending further order of the Board.

47. Voters in the engineers' vote will be asked to check off answers to two questions printed on the outside of the outermost of the two envelopes in which their ballot is segregated, and to sign the outer envelope:

1. Are you a member of the engineering profession entitled to practice in Ontario?

YES NO

2. Are you employed by Ontario Hydro in a professional capacity as a professional engineer?

YES NO

The intent of this is to generate material which may assist the parties in themselves narrowing or resolving their dispute about whose wishes are to be taken into account on this issue.

48. The Notice of Taking of Vote should note that those eligible to vote in the Engineers' Vote are also eligible to vote in the representation vote.

49. In its filings, the Coalition asks that we direct Hydro to afford the Coalition the use of Hydro's internal mail system. That request is opposed by the Society. Hydro seems to agree that the Coalition should be able to use its mail system. It is not clear whether Hydro wishes us to sanction that use in advance or is simply serving notice that it will permit use. We do not propose to give advance directions as to the use which may be made of Hydro's mail system in connection with these votes.

50. In their filings, Hydro and the Coalition express some concern that affected employees have not had proper notice of this application. With this decision, the Registrar will be delivering to Hydro for posting an appropriate number of Notices of Taking of Vote and voters' lists, giving all affected employees notice of the taking of the vote and their opportunity to participate in it. After the vote is conducted, and before any hearing is held, multiple copies of a further notice will be delivered for posting in accordance with the Board's rules of practice. That notice will give all affected employees notice of what to do if they wish to make representations concerning the conduct of the vote or in connection with any issue in the application. No hearing will be held before affected employees receive notice of what they must do if they wish to participate.

51. To the extent they have not been addressed in this decision, the matter of arrangements for the conduct of the aforesaid votes is referred to the Registrar, who should also begin setting aside hearing dates for hearings to be held commencing as soon as possible after the expiry of the time for filing notice of desire to make representations which will be specified in the post-vote notices to employees.

52. Once again, we wish to make it clear that in deciding to direct a pre-hearing representation vote and a vote with respect to professional engineers' wishes we have not resolved in any party's favour any of the disputed issues which will have to be dealt with before the Board can decide what use, if any, will be made of the results of those votes. Those issues will not be decided before all interested parties have had the opportunity of a hearing.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; January 31, 1991

1. I dissent.

2. Although the majority decision alerts the applicant to consider the effect of section 103(3) under certain circumstances, I am more troubled by the applicants application for certification and request for a pre-hearing vote than my colleagues.

3. I would not permit this application to proceed in view of the fact that there is an active application for certification in process. Had the applicant withdrawn its first application before or at the time of filing this one, the concerns I have at this point in time with respect to their application may have been alleviated to the point that would have influenced me to support my colleagues and direct a pre-hearing vote.

1600-90-R United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, Applicant v. P.H. Atlantic Plumbing & Heating Division of 629629 Ontario Limited, Respondent

Certification - Construction Industry - Reconsideration - Employer receiving timely notice of certification application but notice not posted at shop until one day before terminal date - Advice of posting card returned by union mistakenly filled out with inaccurate information - Whether Board should revoke certificates and extend terminal date - Board deciding that employer cannot rely upon its own failure to post notices in timely fashion to support request for reconsideration - Board not allowing employer to rely upon allegation that employees did not receive proper notice - Request for reconsideration dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Kurchak*.

APPEARANCES: *Neil Meikle* and *Larry Cann* for the applicant; *James E. Bowden* and *Juliana Tang* for the respondent;

DECISION OF THE BOARD; January 18, 1991

1. This request for reconsideration was listed for hearing by decision of the Board dated December 7, 1990.

2. By decision of the Board dated October 9, 1990 two certificates were issued to the applicant pursuant to section 144(2) of the *Labour Relations Act* ("the Act"). One certificate was with respect to all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. The other was with respect to all plumbers and plumbers' apprentices, steamfitters, steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. These certificates were issued without a hearing in accordance with the Board's discretion under section 102(14) of the Act.

3. By letter dated November 8, 1990, the respondent through its solicitor applied to the Board to have it reconsider and revoke its decision to certify the applicant. That request was opposed by the applicant in a letter dated November 21, 1990. Counsel for the respondent made further written submissions in letters dated November 29, 1990 and December 11, 1990.

4. The primary ground for the request for reconsideration is the respondent's assertion that it did not receive timely Notice of the Application for Certification and was therefore unable to prepare a timely reply or provide proper notice to employees whose rights might be affected by this application.

5. In our decision dated December 7, 1990 listing this matter for hearing we noted the following:

4. The respondent through its counsel asserts that it did not receive from the Board

Forms 77, 78, 74, 81, Schedules to Form 77 and the notice entitled "Notice to Employees" ("the appropriate documentation") until October 1, 1990. It is further asserted that this documentation was not "brought to the attention of management until October 2, the terminal date". As a result, the notices were not posted until October 2, 1990 and were then only posted "in the shop located at its [the respondent's] head office" because "... there was no opportunity to post at the various construction sites in the province at which employees were working ...".

5. The respondent did not file a timely reply and schedules, and did not return Form 74, the Return of Posting Card. Counsel for the respondent in his letter to the Board states that the respondent posted the notices on October 2, 1990 and mailed the Return of Posting Card. The Board notes that it has not received any Return of Posting Card from the respondent. The Board further notes that it did not receive a reply from the respondent or a list of employees until it received this reply [sic] for reconsideration on November 9, 1990.
6. We note that at the time of our decision dated October 9, 1990, this panel of the Board had received a duly completed "advice of posting" card, from the applicant. On that card Mr. Larry Cann, a representative of the applicant states that he had "ascertained from employees affected by this application that the Notices to Employees (Form 78) were posted by the employer on September 27, 1990." We also note that the records of the Board indicate that the appropriate documentation was sent to the respondent at its proper address at 3206 Wharton Way, Mississauga, Ontario by Quick Messenger Service (Ontario) Ltd. on September 25, 1990 and was received at that address on that day as evidenced by a signature on the consignee portion of the receipt bill.
7. On October 9, 1990, the Board therefore dealt with the application on the basis of the evidence before it and without a hearing pursuant to section 102(14) of the *Labour Relations Act*.
8. In its request for reconsideration the respondent asserts that at the time we made our decision the facts were not as indicated in paragraph 6 herein. The respondent asserts it received the documentation from the Board on October 1, 1990 and not September 25, 1990 as indicated by the Quick Messenger Service receipt, and asserts that the notices were posted on October 2, 1990 and not September 27, 1990 as indicated on the advice of posting card returned by the applicant.

6. As indicated, the reason this request for reconsideration was scheduled for hearing was because of the factual assertions contained in the respondent's submissions that it had not received the application for certification until the date which preceded the terminal date and as result had failed to post it in a timely manner. The purpose of the hearing therefore was to hear the evidence and submissions of the parties concerning the disputed fact as to when notice of the application was given to the respondent.

7. At the commencement of the hearing of this matter on January 7, 1991, the respondent acknowledged that, contrary to its assertions in its request for reconsideration it did in fact receive notice of the application at its offices on September 25, 1990 - at least 7 days before the terminal date. The Board would not normally have conducted a hearing in respect of a respondent's request for reconsideration where, as here, the respondent admits that it inaccurately sets out the facts in support of its request for reconsideration. Indeed, if the respondent had admitted in the written submissions requesting reconsideration that notice of the application had been received on September 25, 1990 but had not been posted until October 1, 1990, it is unlikely that this request for reconsideration would have been scheduled for hearing in the absence of any complaint from any other person whose rights are likely to be affected by the application that they had not received proper Notice of the Application.

8. The matters ultimately addressed by the parties in respect of Notice, the Advice of Posting by applicants and respondents, and the Board's jurisdiction to deal with Certification Applications in the Construction Industry without a hearing pursuant to section 102(14) of the Act, are important issues to all members of the labour relations community. As a result, in the circumstances of this case, we have addressed the request for reconsideration and the submissions of the parties.

9. At the hearing of this matter on January 7, 1991, in addition to their agreement that the application for certification and other appropriate documentation was received by the respondent in its offices on September 25, 1990, the parties agreed that the person who normally opens such mail was away and did not in fact open the mail or become aware of the application for certification until October 1, 1990. It was further agreed that on October 1, 1990, one notice to the employees was posted in the respondent's shop located at its Head Office. This notice remained posted there until some time in December 1990. (From time to time employees attend at the respondent's shop.) The notices were never posted at any of the respondent's job sites. The respondent has approximately six to eight job sites throughout Ontario. The Advice of Posting Card returned by Mr. Larry Cann upon which the Board relied is inaccurate. It was mistakenly filled out with incorrect information.

10. In his submissions to the Board counsel for the respondent relied principally upon the Board's decision in *Visser's Nursery*, [1990] OLRB Rep. Sept. 989. Counsel argued that an applicant union has an obligation to ensure that the information which it provides to the Board is accurate. Counsel asserted that this case was not materially different from *Visser's Nursery*, *supra*. There, the Board was faced with a situation where certificates had been issued although the applicant had supplied incomplete information. Here, the certificates were issued although the applicant supplied inaccurate information.

11. In *Visser's Nursery*, the Board stated:

11. As paragraph 4 indicates, the materials sent to the employer named as respondent to an application for certification includes notices to employees and a direction to the employer to post the notices. These notices advise the employees of the application and their rights to participate in it. It is the legal obligation of the respondent to an application for certification to make sure that the notices are posted. *The Board is concerned that employees whose rights are likely to be affected by an application are given proper notice of it. For that reason, the Board seeks information from both the applicant and the respondent described above in paragraphs 4 and 5 with respect to the posting of its notices to employees.* When the Board is aware that the employer has not posted the notices to employees, it will exercise its powers under clauses(e) and (g) of subsection 103(2) of the Act to authorize a Board officer to enter the premises or job sites where employees of the respondent are working and make the posting. If the Board has not been promptly advised of the posting problem, it may be necessary to extend the terminal date fixed for the application in order for proper notice to be given to employees, thus delaying the application's processing. Therefore, by being prompt in checking to see whether the employer has posted the Board's notices, the applicant's representative can avoid the delay caused by the need to extend the terminal date. Applicants under the construction industry provisions of the Act are duly forewarned of the risk of delay by the passage quoted above from the Registrar's instructions to the applicant.

12. In this application it would appear that the representative of the applicant was not prompt in checking on the posting. As noted above, the Registrar's notice to the applicant acknowledging the application and instructing the applicant on filing the Advice of Posting Card was sent on May 14, 1990. The Advice of Posting Card was received by the Board on May 24, 1990, one day after the terminal date. The applicant's representative was not diligent either. If the representative did ascertain that the posting had been made, he failed to indicate the date on which it was observed to have been made. If he ascertained the contrary, he failed to record that information on the Advice of Posting Card. The result for this application is that there is nothing on the

Board's record from which the Board might satisfy itself that employees affected by the application had proper notice of it.

13. *It is not too much to ask of an applicant, who expects the Board to exercise its discretion to process the application for certification without a hearing, to investigate or ascertain from employees affected by the application whether the Board's notices to employees have been posted, to properly complete and duly file an Advice of Posting Card.* This is particularly so when the important rights which flow from certification under section 144(2) of the Act are considered. When the certificates were issued to the applicant in this application, in addition to the applicant becoming the exclusive bargaining agent of the respondent's construction labourers employed in the bargaining unit described in the certificates, the applicant and the respondent became bound immediately to the provincial agreement for construction labourers, pursuant to subsection 145(4) of the Act.

[emphasis added]

12. The substance of counsel's submissions was that if the Board had not received the inaccurate Advice of Posting Card provided by the union, it would not have issued certificates on October 9, 1990. Rather, the Board would have extended the terminal date and directed an officer to post the appropriate notices to ensure that the employees whose rights are likely to be affected by this application were given proper notice of it.

13. It was submitted that where the Board relies upon inaccurate information supplied by the applicant union to certify the applicant, and the Board subsequently ascertains that such information is inaccurate it should revoke the certificates, extend the terminal date and thereafter deal with the application in the usual manner.

14. In response to these submissions counsel for the applicant argued that the respondent ought not to be able to rely upon its own failure to post or file a reply in a timely manner to support its request for reconsideration. Counsel asserted that when the respondent failed to "open its mail", post the notices or file a reply in a timely fashion it did so at its own peril. (See *Ferano Construction L.T.D.*, [1985] OLRB Rep. Jan. 73, *Norben Ontario Design Limited*, [1984] OLRB Rep. June 851). Counsel argued that the respondent cannot take advantage of its own wrong doing.

15. Counsel for the applicant also submitted that none of the employees of the respondent have complained to the Board of insufficient notice of the application, and none have requested reconsideration of the Board's decision of October 9, 1990. Counsel asserted that the respondent employer cannot represent employees in a certification application.

16. Counsel further argued that the request for reconsideration did not fall within the parameters set out in Practice Note 17. He submitted that in the circumstances of this case, if the Board reconsidered its decision it would cause prejudice to the applicant and undermine the concept of finality of Board decisions.

17. For the reasons set out herein we have determined not to exercise our discretion under section 106(1) of the Act to reconsider our decision dated October 9, 1990.

18. We concur with and adopt the statements of the Board in *Vissers Nursery*, *supra* that both the applicant and the respondent are directed and obliged to advise the Board as to whether proper notice of the application has been given to the employees whose rights may be affected by it. We emphasize that it is an important duty of an applicant union to promptly and accurately advise the Board as to whether the notices have been properly posted. Indeed, the exercise of due diligence in this regard benefits the applicant in certification proceedings and advances the interest of the persons it seeks to represent.

19. It has been the experience of the Board that a significant number of employers in the construction industry either do not post the notices or alternatively post the notices but fail to return the Notice of Posting Card or file a timely reply to the application. If an applicant ascertains that notices have been properly posted and advises the Board, the Board may be able to deal with an application for certification pursuant to section 102(14) of the Act without a hearing and on the basis of the material submitted by the applicant without undue delay. This notwithstanding a respondent's failure to file a reply. If a respondent fails to post the notices and an applicant so advises the Board, the Board can authorize a Board Officer to enter the employer's premises and post the notices without unduly delaying an application for certification.

20. Where an applicant mistakenly or negligently files inaccurate information which is subsequently challenged by a respondent or its employees it runs the risk that the certificates which have been granted to it will be revoked because, for example, employees whose rights are likely to be affected by the application have not been properly notified.

21. Notwithstanding these observations and our adoption of the decision of the Board in *Vissers Nursery*, we do not view that decision as applicable to the facts before us.

22. In *Vissers Nursery* there was "nothing on the Board's record from which the Board might satisfy itself that employees affected by the application had proper notice of it." Indeed, in *Vissers Nursery* the Board listed the matter for a hearing for the very purpose of "receiving the evidence and representations of the parties respecting whether employees received proper notice of the application for certification and, if not, what effect that should have on the certificates which have been issued to the applicant."

23. In the case before us, the parties are agreed that the notices were posted at the employer's shop on October 1, 1990 and that they remained posted there until some time in December 1990 - a period of at least two months. The respondent's employees from time to time attend at the shop. They would therefore have become aware of the union's application yet during the period from October 1, 1990 to January 7, 1991 (the date of hearing) no employee has written to the Board to object to the application for certification, or alleged that s/he did not have proper or sufficient notice of the application, or request the Board to reconsider its decision.

24. In the circumstances we have determined that the respondent cannot rely upon its own failure to post the notices or reply in a timely fashion to support its request for reconsideration. The employer was provided with sufficient time to post and reply but did not do so. It acted or rather failed to act at its own peril. As stated in *Ferano Construction L.T.D.*, *supra* at paragraph 4:

4. In proceedings under the *Labour Relations Act*, the Board is governed by the Act and the Regulations under the Act. Provision is made in the Rules of Procedure for the filing of a reply by the respondent. The respondent did not file a reply to this application and now seeks to have the Board re-open the application at the respondent's leisure. Under the Rules of Procedure, the respondent was required to file its reply no later than the terminal date fixed for this application, namely, November 27, 1984. In proceedings before the Board there is a need for finality and, to this end, the Rules of Procedure under the Act provide for the appropriate time when a respondent is required to make its position known to the Board. It is not open to the respondent to refuse mail, to wait until the certificates have been issued, and then to present the Board with a set of facts which could have been presented in a timely manner.

25. In the circumstances of this case, the respondent employer also cannot rely upon its allegation that the employees did not receive proper notice. In *Re. Canada Labour Relations Board and Transair Ltd. et al* 67 D.L.R. (3rd) 421, the Supreme Court of Canada stated at page 438:

If there is any policy in the Canada Labour Code and comparable provincial legislation which is pre-eminent it is that it is the wishes of the employees, without intercession of the employer (apart from fraud), that are alone to be considered vis-à-vis a bargaining agent that seeks to represent them. The employer cannot invoke what is a *jus tertii*, especially when those whose position is asserted by the employer are not before the Court.

26. In its earlier decision in *Cunningham Drug Stores Ltd. v. B.C. Labour Relations Board et al.* (1972), 31 D.L.R. (3d) 459, the Supreme Court of Canada stated at pp 464-5:

There is a further question which arises in respect of the issue now raised by the appellant, and that is as to its right to seek to set aside the Board's decision because it alleges that the rights of other parties were not observed. In *Quebec Labour Relations Board v. Cimon Ltee* (1971), 21 D.L.R. (3d) 506, [1971] S.C.R. 981, the employer company sought the rescission by the Quebec Labour Relations Board of its directing a vote on the application of a trade union for certification on the ground that notice of the petition for certification had not been given to another union, whose earlier petition for certification had been rejected following an employee's vote. The company contended that the unsuccessful union was successor to former unions which had been certified, whose certification had not been cancelled, and that it was therefore entitled to such notice.

The Board ruled that the company was unlawfully pleading on another's behalf an objection in which it had no legal interest. This position was sustained in *this Court*, which held that the company was not entitled to invoke the rights of another party before the Board.

[emphasis added]

In our view the same reasoning applies to the facts of this case.

27. For all of these reasons the request for reconsideration is dismissed.
28. We note that on the day following the hearing two letters were delivered to the Board. These letters state as follows:

My name is Danny Kwan and I am employed by P.H. Atlantic Plumbing & Heating. I was present at the Hearing today as 7 January, 1991 at the labour board.

I have been employed by this company for 5 years, and wish to remain with this company. I Do Not want to join a Union. I wanted to speak at the hearing, but was told whom [sic] I raised my hand to speak, that I was not allowed even though it was a public Hearing. I wish to go on record as saying I Do Not want to join the Local Union 463.

Please accept this letter in that regard.

Yours very truly,

Danny Kwan.

My name is Xian Jui Chen, I appeared with Danny Kwan at the Hearing for P.H. Atlantic Plumbing & Heating as January 07, 1991.

I was working in Peterborough in September of 1990 when the Union approached us at the job site. I have worked with P.H. Atlantic for one year and want to stay with this company.

I Do Not want to join a Union and wanted to tell the Board this at the Hearing. This letter is to inform the Board of my reasons for being at the Hearing.

Yours truly

Xian Jiu Chen
Date: January 07, 1991

29. We note that Mr. Kwan's letter insofar as it states that "I wanted to speak at the hearing, but was told [when] I raised my hand to speak, that I was not allowed ..." is, in our view factually inaccurate. Nevertheless we have considered the written submissions of Messrs. Kwan and Chen.

30. We must assume that had Messrs. Kwan and Chen been made parties to the proceedings, and made oral submissions to the Board at the hearing they would have addressed only those matters set out in their January 7th correspondence to the Board. Messrs. Kwan and Chen were in attendance in the body of the hearing room throughout the hearing. They were therefore present when counsel made their submissions in respect of the posting of the notices and the sufficiency of notice. Their written submissions do not refer to that issue. Neither these two employees or any other employee wrote to the Board in the three months preceding the hearing to indicate that they were opposed to the application for certification, wished to participate as a party in these proceedings, objected to the sufficiency of Notice of the Application which had been given to employees, or wished to raise any other matter with the Board. We must therefore assume that the only matters which Messrs. Kwan and Chen wish the Board to consider are contained in their letters and consist of their personal objection to join a union.

31. The written submissions received merely state the individual employee's opposition to becoming a member of the applicant union. The Act does not require that a union obtain the unanimous support of employees before it is entitled to be certified. Rather the Act provides that if more than fifty-five percent of the employees in the bargaining unit are members of the applicant union as of the terminal date (the date which is established pursuant to the Board's authority under section 103(2)(j) of the Act) the Board is authorized to automatically certify the trade union. In this case, notwithstanding the opposition of these two employees to the union's application, the Board is satisfied that more than fifty-five percent of the employees in the bargaining unit were members of the applicant union as of the terminal date.

32. We therefore confirm our decision dated October 9, 1990 and the certificates granted to the applicant union.

1530-90-U The Canadian Union of Public Employees and its Local Union 1140, C.L.C., Complainant v. The Corporation of the City of Timmins - Golden Manor Home for the Aged, Respondent

Duty to Bargain in Good Faith - *Hospital Labour Disputes Arbitration Act* - Interest Arbitration - Unfair Labour Practice - Employer tabling new proposal after lengthy negotiations and "no board" report issued - Proposal aimed at reversing effect of rights arbitration award issued only days before - Interest arbitrator pursuant to *Hospital Labour Disputes Arbitration Act* not yet appointed - Whether bad faith bargaining - Board declining to find prior to conclusion of bargaining process that parties "locked in" to proposals - Complaint dismissed

BEFORE: Janice Johnston, Vice-Chair, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: Orval Turcotte for the complainant; Joe Torlone and G. B. Chevette for the respondent.

DECISION OF VICE-CHAIR, JANICE JOHNSTON AND BOARD MEMBER W. H. WIGHTMAN; January 8, 1991

1. File No. 1530-90-U is a complaint filed pursuant to section 89 of the *Labour Relations Act* ("the Act") alleging a violation of section 15 of the Act. Section 15 states:

15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

2. The Canadian Union of Public Employees, Local Union 1140 C.L.C. ("CUPE" or the "union") took the position that The Corporation of the City of Timmins Golden Manor - Home for the Aged (the "employer") has bargained in bad faith contrary to section 15 of the Act.

3. The essential facts are not in dispute. The parties are currently in the process of negotiating a collective agreement. The previous collective agreement expired December 31, 1989, and the union wrote to Mr. Chevrette, the CAO of the City of Timmins, on October 3, 1989 advising him that they wished to commence negotiations. The parties met, exchanged proposals and the negotiations continued. In June, 1990 a conciliation officer was named and the parties and the officer met on August 2, 1990.

4. In order to understand the basis of the union's complaint it is also necessary to provide some history and review events occurring simultaneously with the current negotiations. In March, 1986 the parties received the award of a rights arbitrator C. William Dunn dealing with an interpretation of the collective agreement pertaining to an employees right to accumulate vacation credits while absent on Workers' Compensation. Arbitrator Dunn found that an employee was entitled to accumulate vacation credits which on the facts in this case resulted in an employee receiving vacation pay as well as full salary for a period of 19 months. The relevant language in the collective agreement existing at that time was:

ARTICLE #20 -- VACATIONS

20.01 That permanent employees shall be eligible for vacation with pay on the following basis:

Less than one (1) year -- In accordance with The Hours of Work and Vacation with Pay Act.

After one (1) year - Two (2) weeks.

After four (4) years - Three (3) weeks.

After seven (7) years - Four (4) weeks.

After twenty (20) years - Five (5) weeks.

20.02 That if a paid holiday falls or is observed during an employee's vacation for each holiday, in addition to his regular vacation time he shall be granted an additional day's vacation with pay.

20.03 Annual Vacation

Where two or more employees from the same classification request the same dates, seniority shall govern. All requests shall be made at least three (3) weeks in advance.

As a result of this award, the employer sought to amend the language in the next negotiations for a renewal of the collective agreement. The parties were unable to agree and the matter was decided by an interest award issued by R. D. Joyce dated June 19, 1986.

In dealing with article 20.01 the arbitrator stated:

Article 20.01 - Vacation Pay

The Employer's proposal would provide for a new requirement in the collective agreement:

"Vacation with pay is an earned benefit and any absence (other than for approved vacation) in excess of thirty (30) calendar days in a calendar year shall result in vacation credits being pro-rated."

The Employer states its case as follows:

"During 1984 and 1985 a maintenance employee at the Golden Manor was absent for some 19 months while on WCB. Upon his return to work in November of 1985, the employee grieved that the City owed him 38 days vacation with pay for the time he was off work for 19 months, notwithstanding the fact that he had received full salary during his absence.

"The City refused to pay on the grounds that vacation with pay is a component of annual salary and should not be in addition to annual salary. The maintenance employee grieved the City's decision and at arbitration the Arbitrator did not agree with our position and allowed the grievance with the result that we are obliged to pay the grievor 38 days' pay, which is in addition to his annual salary.

"The Employer has filed for judicial review and the matter is currently before the courts."

The Union takes the position that this Board should not interfere with either a third party rights award or an application for Judicial Review which is currently before the Courts.

This interest Board gives every assurance that it has no intention of attempting to interfere with any decision or appeal; any change which this Board would contemplate would, at the earliest, be effective from the date of this award and would have no effect on any earlier events. That being the case we now turn to an examination as to whether such a change is appropriate.

Without commenting on the possible interpretations of the present provision, the Board has reviewed the vacation Articles of The St. Mary's General Hospital agreement, as well as the Timmins Nursing Home (Extendicare) agreement. In both cases it appears to this Board that those agreements provide for vacation reduction for absences in one form or another, either via a formula or by the application of percentage of earned pay. In those cases it would not be possible to receive income, for example, of 56 weeks' pay for any 52-week period.

It is the opinion of the Board that it is not unreasonable to have vacation pay relate to time worked in some manner. At the same time it is reasonable to recognize that an employee absent due to paid illness and Workers' Compensation should not suffer loss of vacation earnings, nor should that employee receive higher compensation from the combination of sick pay/W.C.B./regular earnings than he/she would have had he/she been regularly at work.

The Board awards: An employee's vacation entitlement shall be proportionately reduced for unpaid absences in excess of thirty (30) cumulative days during the period of qualifying the employee for vacation. Absences due to paid sick leave and Workers' Compensation shall be excluded from such calculation except that in no case will an employee be credited for periods of absence which would result in greater annual compensation than he/she would have received had he/she worked normal hours throughout the year.

5. Mr. Joe Torlone the Director of Social and Family Services was called by the employer to give evidence. He testified that from mid - 1976 till it was challenged by a grievance in August 1990, the employer pro-rated employee's vacation credits for any absence in excess of 30 days, except paid vacation. This pro-ration is calculated by the personnel department and a list showing the employees name and vacation entitlement is sent to the operating divisions. Mr. Torlone made

it clear that this pro-ration of vacation credits is not restricted based on the reason for the absence and occurs whenever an employee has been absent for more than thirty days.

6. On June 11, 1990 a grievance was filed by CUPE on behalf of Ms. Philomene Lefebvre stating:

management has violated the collective agreement under Article 20 Clause 20:02 and any other Clause.

and requesting that:

my proper amount of holidays be credited.

This grievance proceeded to arbitration and the decision of Arbitrator Jolliffe dated August 28, 1990 found the employer to be in violation of Article 20.02. The existing Article 20.02 (in accordance with the Joyce award) states:

20.02 An employee's vacation entitlement shall be proportionately reduced for unpaid absences in excess of thirty (30) cumulative days during the period of qualifying the employee for vacation. Absences due to paid sick leave and Workers' compensation shall be excluded from such calculation except that in no case will an employee be credited for periods of absence which would result in greater annual compensation than he/she would have received had he/she worked normal hours throughout the year. Vacation credits shall not be prorated in the event of an approved maternity leave of absence effective upon the date of signing this agreement.

Arbitrator Jolliffe in interpreting this language stated:

... Whatever the stated position of the City at the interest arbitration procedure, in my view, the present language of the collective agreement excludes proportionate reduction for Workers' Compensation Board approved absences from the workplace unless it can be shown that an employee, in being credited for a period of such absence, would receive greater annual compensation than he/she would have received had he/she worked her normal yearly hours. ...

7. On September 4, 1990 the employer sent the following letter to the union:

I have just received Arbitrator Jolliffe's award which allows Philomene Lefebvre's grievance on accumulated vacation credits.

The purpose of this letter is to put you on notice that in light of Arbitrator Jolliffe's award, we are tabling the following contract amendment request to provide for vacation to be an earned benefit:

Vacation with pay is an earned benefit and any absence (other than for approved vacation) in excess of thirty (30) calendar days in a calendar year shall result in vacation credits being pro rated.

This letter was written on the first working day following the employers receipt of the Jolliffe award. The parties agree that at no time prior to this letter was Article 20.02 ever raised by either party as an Article to be amended. Neither party in it's proposals ever raised or mentioned Article 20.02 prior to this letter by the employer.

8. The parties met with a conciliation officer on August 2, 1990. A "no board" report was issued on August 10, 1990. The parties have applied for the appointment of an arbitrator pursuant to the *Hospital Labour Disputes Arbitration Act*, however as of the date of the hearing in this matter, November 22, 1990, no one had been appointed.

9. The issue therefore to be decided by this Board is whether the raising of a new proposal

by the employer after lengthy negotiations and a “no board” report has been issued constitutes bad faith bargaining. The union took the position that they were unaware of any violation of Article 20.02 prior to the Lefebvre grievance. They maintained that the language was clear and that they did not realize the employer was not following it. They dispute whether in fact the employer was violating the language before the Lefebvre grievance. The union also submitted that the employer should not be allowed to table new items after conciliation has taken place and a request for the appointment of an arbitrator initiated. The union maintained that it did not want the employer to establish the practice of introducing last minute proposals. They requested that the Board direct that the employer does not have the right to submit amendments with regard to Article 20.02 before the interest arbitrator.

10. The employer took the position that there has been a long standing disagreement between the parties with regard to the practice of pro rata vacation reductions and that the employer has sought to amend the collective agreement to meet its needs since the Dunn award. Mr. Chevrette on behalf of the employer indicated that even if the union was not aware of the manner in which they had interpreted the Joyce award the employees were and had not complained (prior to Lefebvre). The employer therefore had no reason to raise an issue regarding Article 20.02 until it received the Jolliffe award. The employer submitted that immediately upon receipt of the award they put the union on notice that they would be seeking an amendment to this Article. Mr. Chevrette admitted that the negotiations were well under way at the time of the Jolliffe award and that at no time prior to this had either party made a request to amend Article 20.02. He indicated however that the Jolliffe award came as a surprise and that they could not be viewed as “sitting in the bushes” with regard to the request to amend Article 20.02. He indicated that the amendment he is seeking reflects the way the employer has administered the pro rata reduction of vacation in the past. Had the employer realized that there was a problem with their interpretation he indicated they would have tabled a proposal to amend the language of the collective agreement. Mr. Chevrette admitted that in normal circumstances the tabling of late proposals should not be permitted and that had it been unrelated to the Jolliffe award he too would have found the employers actions worthy of a section 89 complaint. Mr. Chevrette submitted that the facts before the Board cannot support a finding of bad faith bargaining or unfair labour practice. He requested that the Board so find and that the Board not prevent the request for an amendment to Article 20.02 from proceeding before an interest arbitrator.

11. The purpose and extent of the duty under section 15 to bargain in good faith and make every reasonable effort to make a collective agreement has been canvassed in many previous Board decisions. In many instances the Board has dealt with an attempt by one party to repudiate that a collective agreement has been concluded and introduce new terms and conditions. As was stated by the Board in *Le Droit*, [1988] OLRB Rep. April 412 at page 414:

... The Board's jurisprudence clearly indicates that where, in circumstances such as these, the parties have bargained for and agreed to all the terms of a collective agreement, it is a violation of section 15 for the company to resile from that agreement. (*Corporation of the City of Thunder Bay*, [1983] OLRB Rep. Oct. 1722; *Coulter Copper & Brass Limited*, [1981] OLRB Rep. May 519; *Selinger Wood Limited*, [1980] OLRB Rep. Nov. 1688; *Graphic Centre (Ontario) Inc.*, [1976] OLRB Rep. May 221; *Municipality of Casimir, Jennings & Appleby*, [1978] OLRB Rep. June 507; *Fotomat Canada Limited*, [1981] OLRB Rep. Feb. 145; *Treco Machine & Tool Limited*, [1982] OLRB Rep. Dec. 1954; *Saville Food Products, Inc.*, [1986] OLRB Rep. Apr. 522; *Sparton of Canada Limited*, [1985] OLRB Rep. Sept. 1420.)

12. On the facts in this case neither party is asserting that a collective agreement has been concluded. The parties are in fact seeking the appointment of an arbitrator pursuant to the *Hospital Labour Disputes Arbitration Act* so that they may resolve all outstanding items. In dealing with an employer who changed its final offer after a lengthy strike and after it had been accepted

by the union the Board stated in *Wilson Automobile (Belleville) Ltd.*, [1980] OLRB Rep. July 1136:

7. We start with the long held view of this Board that "the parties are best able to fashion the law which is to govern the workplace and that the terms of an agreement are most acceptable when the parties who live under them have played the primary role in their enactment." (See the *DeVilbiss (Canada) Ltd.* case, [1976] OLRB Rep. March 49 at para. 13) This Board recognizes the concept of voluntarism as relied upon by the respondent company. As a general proposition a party is free to take whatever position best satisfied its self interest providing it maintains the intention of concluding a collective agreement. The difficult cases arise where a party tables a position which it maintains is legitimately in its self interest but which the other side maintains is destructive of the process or designed to avoid a collective agreement and to undermine the trade union. In the *Pine Ridge District Health Unit* case, [1977] OLRB Rep. Feb. 65 the Board noted:

"Collective bargaining does not take place in a vacuum or in a period where time and events are frozen. Generally, as in this case, it occurs over an extended period of time against a fluid backdrop of events. A party may thus come to reshape its view of its own best interests from one point in time to another and so wish to change its position at the bargaining table. The party opposite cannot be taken to be unaware of the increasing likelihood of that happening with the passing of each successive day and week. The old caution, "Take it before I change my mind" reflects a widely accepted bargaining precept that has its proper application in collective bargaining..."

(See also *Toronto Jewellery Manufacturers' Association* [1979] OLRB Rep. July 719).

However, the Board's views as expressed in the *Pine Ridge District Health Unit* case, *supra*, cannot be taken as a carte blanche to alter one's bargaining position at any time and for any reason. Clearly, an alteration of position designed to wreck the critical decision-making framework necessary for collective bargaining [sic] would be contrary to section 14 of the Act. (See the *Graphic Centre (Ontario) Inc.* case, [1976] OLRB Rep. May 221.) Similarly, the move to a position tailor-made for rejection would betray an intention not to conclude a collective agreement contrary to the duty imposed by section 14 of the Act. It follows, therefore, that while the parties may govern themselves by self-interest and may alter bargaining positions in response to changes in relevant conditions, a party which alters its bargaining position may leave itself open to the allegation that it is bargaining in bad faith. It falls to the Board in these cases to examine the evidence in light of the labour relations dynamics and draw the appropriate inferences.

Although the Board in the above case reached the conclusion that the employer had contravened section 15 (it was then section 14) the reasoning outlined is helpful in our situation.

13. At no time was it alleged before us that the employer was attempting to thwart the collective bargaining process, or avoid a collective agreement, or to undermine the trade union. The union is seeking a finding of bad faith bargaining. Based on the facts before us we cannot reach such a conclusion. While we do not condone what the employer has done in this case, because of the uncertainty it could cause in future negotiations, neither can we find it to constitute a breach of section 15 of the Act. Collective bargaining is at its heart a process whereby both parties seek to maximize their position and get a "good deal". To say that at some point in time before the conclusion of the bargaining process that the parties are "locked in" to one set of proposals would impose an unduly rigid framework on the process. The actions of the employer in tabling a request to amend Article 20.02 while perhaps not wise in light of the future relationship, do not constitute a violation of section 15.

15. For all of the above reasons this complaint is dismissed.

DECISION OF BOARD MEMBER B. L. ARMSTRONG; January 8, 1991

1. I have read the decision of the majority and with respect I am unable to agree with the decision. While I do not disagree with the facts as presented by the majority, for the purposes of my dissent a few facts should be re-stated.
2. In June, 1990 a grievance was filed by the union on behalf of the employees. The grievance challenged management's interpretation of article 20.02 of the Collective Agreement. The arbitrator's award was dated August 28, 1990.
3. The parties had been collective bargaining prior to the filing of the grievance and a Conciliation Officer met with the parties on August 2, 1990. A "No Board" report was issued on August 10, 1990. The parties applied for the appointment of an arbitrator pursuant to the *Hospital Labour Disputes Arbitration Act*.
4. It is important to note that the settlement of a collective bargaining dispute under *Hospital Labour Disputes Arbitration Act* is the substitution for a strike/lockout.
5. The role of an interest arbitrator is to substitute his judgement for the collective agreement which the parties would negotiate while subject to the experience of a strike or lockout. The collective agreement which the interest arbitrator imposes on the parties is to replicate those working conditions which the parties would agree to if they had the right to strike and/or lockout.
6. Unfortunately, almost all available evidence suggest compulsory arbitration systems reduce the likelihood that the parties in fact would be able to reach an agreement at the bargaining table. In addition, compulsory interests arbitration lengthens the time between expiry of a collective agreement and the completion of a new negotiated or imposed collective agreement.
7. One of the reasons interest arbitration produces a lower rate of settlement is because it produces a lower cost of disagreement than does a strike.
8. I cannot imagine an employer, shortly before the date on which the union could strike or the employer could lock out, introducing a demand for a concession from the union. I do not believe that any employer would either lockout or withstand a strike over the issue of vacation accrual while on Workers' Compensation.
9. I say this knowing that the issue of accruing vacation and pension credits while on Workers Compensation is an issue that has been raised in both the private and public sectors with the prevailing position that an employee on Workers' Compensation does accrue such credits.
10. It should also be noted that the parties have resorted to interest arbitration on at least two other occasions. This, of course, is an example of the so called "Narcotic" effect: under interest arbitration, negotiators become accustomed to and rely on arbitration as a way of settling their disputes; they become addicted to interest arbitration.
11. Given the above background, it is useful to ask the following question: Why did the employer not raise the issue during collective bargaining when the union made it aware in June, 1990 that it disagreed with the employer's interpretation of the Collective Agreement?
12. The issue has been succinctly summarized by Vice Chair Bendel in "Good Faith Bargaining in Ontario", University of Toronto Law Journal volume 30, #1, 1980:

One of the elements of a rational process of persuasion is the requirement that all items intended to be raised by either party be put into dispute in the early stages of negotiation.

13. There are sound labour relations reasons for requiring that a party raise all issues early in the negotiations and not wait until the last minute to “up the ante.”

14. The Board had the opportunity to examine the very issue of raising issues at the last minute in *Geographic Centre (“Ontario”) Incorporated*, [1976] OLRB Rep. May 221. In that case, the union had accepted the company’s offer and the Collective Agreement was to be signed. However, the union lodged a grievance regarding the employer’s action which was independent of Collective Bargaining. The employer would not sign the Collective Agreement unless the union dropped the grievance. The Board stated at Paragraph 20:

the requirements for open and rational discussion of all the issues in dispute stems from the fact the collective bargaining is an essence an exercise in **decision making**. The parties make hard decisions as to the content and timing of their offers and counter offers as they attempt to conclude an agreement... conduct by one of the parties to the process which inhibits or undermines the decision making capability of the other is conduct which is contrary to the requirement to bargain in good faith and make every effort to reach a Collective Agreement.

At paragraph 21, the Board stated:

the decision making capability of the parties depends upon not only a full and open discussion of the items which are in dispute but also upon an awareness that the scope of the dispute is limited to those items which has been put into dispute in the early stages of the bargaining process. Decision making does not take place in a vacuum. The parties set the parameters with their early exchange of proposals thereby establishing the framework within which they negotiate. A party which holds back on an item or number of items and then attempts to introduce these matters into the negotiations as the process nears completion, effectually destroys the decision making framework. A party cannot rationally or properly consider its bargaining position in the absence of absolute certainty that the full extent of the dispute has been revealed. The tabling of additional demands after a dispute has been defined must, in the absence of compelling evidence which would justify such a course, be construed as a violation of the duty to bargain in bad faith.

15. The employer and the union have conducted collective negotiations and are now at the point where they are submitting their outstanding issues to an interest arbitrator. Any concessions the union has made during Collective Bargaining have not been made in a vacuum; on the contrary, there has been give and take throughout the negotiations and union’s concessions had been made with regard to the entire Collective Agreement package.

16. The employer’s introduction of a new demand at this stage of collective bargaining undermines the entire negotiations up to this point. It is trite labour relations that any attempt to undermine the collective bargaining between the parties is bargaining in bad faith.

17. The employer is not without any recourse in this situation. If the employer wishes to reduce cost from compensable injuries in the workplace, the employer can insure to the best of its abilities that no employees go off on Workers’ Compensation by providing a safe workplace.

18. I am forced to conclude that when the employer demands a concession regarding an issue which arose between the parties during collective bargaining, it is bad faith bargaining to demand that concession after conciliation and immediately prior to the appointment of interest arbitrator.

19. For the above reasons, I am unable to agree with the majority of the Board.

2715-89-G; 0013-90-JD United Brotherhood of Carpenters and Joiners of America, Local 1256, Applicant v. **Vic West Steel Limited**, Respondent, Ontario Sheet Metal Workers' and Roofers' Conference and Sheet Metal Workers International Association, Intervener; Ontario Sheet Metal Workers' and Roofers' Conference Sheet Metal Workers International Association, Local 539, Applicant v. Vic West Steel and United Brotherhood of Carpenters and Joiners of America, Local 1256, Respondents, v. Ontario Sheet Metal and Air Handling Group, Intervener

Adjournment - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Reconsideration - Board adjourning s.91 Complaint Concerning Work Assignment pending resolution of issue of bargaining rights in context of s.124 Referral of Grievance to Arbitration - Complainant union requesting reconsideration of procedural direction - Board explaining how resolving bargaining rights issue before proceeding with jurisdictional dispute may reduce cost of any jurisdictional dispute proceeding - Board also satisfied that order of proceeding will result in no prejudice to complainant union - Board declining to reconsider procedural direction

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *G. O. Shamanski* and *J. Redshaw*.

DECISION OF THE BOARD; January 11, 1991

1. By letter from counsel dated December 12, 1990, the Ontario Sheet Metal Workers' and Roofers' Conference and the Sheet Metal Workers International, Local 539 (hereinafter jointly referred to as "Sheet Metal") seeks reconsideration of the Board's December 10, 1990 decision herein as follows:

We are in receipt of the decision of the Board dated December 10, 1990 and respectfully apply for reconsideration of the procedural direction contained therein.

On behalf of the Complainant, by letter dated December 5, 1990, we asserted that no procedural advantage was to be gained from an inquiry into the issue of the existence of bargaining rights between Carpenters, Local 1256 and Vic-West Steel. Counsel on behalf of Carpenters, Local 1256 also adopted this position by letter dated December 4, 1990.

Simply put, it is *not* the grievance filed by Carpenters, Local 1256 captioned as O.L.R.B. File No. 2715-89-G that "raises a spectre of a jurisdictional dispute". The Complainant has filed, and requires, the Board to hear and determine its Complaint Concerning Work Assignment captioned as O.L.R.B. File No. 0013-90-JD irrespective of the existence of or resolution of the Section 124 Referral of Grievance to Arbitration. Accordingly, there is no procedural advantage gained through the direction contained in the Board decision dated December 10, 1990.

Yours truly,

KOSKIE AND MINSKY

"Stephen Wahl"
Stephen Wahl

In the December 5, 1990 letter referred to by counsel, Sheet Metal wrote:

We are in receipt of a letter dated November 26, 1990 in connection with the above-captioned matter requiring our representations with respect to procedure in the light of the *Schindler Elevator Corporation* case. We are also in receipt of a letter dated November 30, 1990 from counsel for the Respondent Vic-West Steel.

The Complainant Sheet Metal Workers withdraws its position denying bargaining rights held by Carpenters, Local 1256 with respect to Vic-West Steel and takes no position with respect to this issue.

Although the issue of the existence of bargaining rights may be relevant to the Referral of Grievance to Arbitration pursuant to Section 124 filed by Carpenters, local 1256, it is merely one factor that may enter into the considerations of the Board in the course of the above-captioned Jurisdictional Dispute. It is the position of our client that this Complaint Pursuant to Section 91 ought to proceed to hearing without further delay and specifically without awaiting a determination of the issue of Carpenters' Bargaining Rights.

Accordingly, we submit that the hearing scheduled for December 14, 1990 ought to proceed and resolve the issues listed in the Notice for Hearing. Thereafter, the merits of the Section 91 Complaint ought to proceed to hearing.

Yours truly,

KOSKIE AND MINSKY

"Stephen Wahl"
Stephen Wahl

Further, by letter dated and delivered December 13, 1990, counsel wrote that:

Further to our request for reconsideration of the Board's decision dated December 10, 1990 filed by our letter dated December 12, 1990, we have been informed that the Applicant Carpenters, Local 1256 and Respondent Vic-West Steel in the Referral of Grievance to Arbitration pursuant to Section 124 of the Act captioned as O.L.R.B. File No. 2715-89-G have agreed to adjourn the hearing scheduled for December 14, 1990.

In view of these events, the procedure adopted by the Board in its decision of December 10, 1990 has proved unworkable. The Ontario Sheet Metal Workers' and Roofers' Conference and Sheet Metal Workers, Local 539 filed an Intervention dated March 14, 1990 with respect to the grievance arbitration containing an undertaking to file the Section 91 Complaint Concerning Work Assignment. All parties to the Section 124 Grievance Arbitration agreed to adjourn those proceedings pending a resolution of the Section 91 Complaint. At no time did we or our client agree to an adjournment of the hearing scheduled for December 14, 1990 with respect to the grievance-arbitration. In the course of discussions with counsel for the other parties we acknowledged that our client had no interest in the issue of the existence of Carpenters' bargaining rights. That position was clearly taken in our letter of December 5, 1990.

Effectively, our client is being denied a hearing with respect to its Section 91 Complaint Concerning Work Assignment by virtue of the Board is [sic] procedural decision to await a resolution of the issue of bargaining rights in the context of the Section 124 Referral of Grievance to Arbitration. Our client *is not prepared* to have its Section 91 Complaint adjourned to the ionosphere while the other parties neglect to pursue the issue of bargaining rights in the context of the Section 124 Referral of Grievance to Arbitration. We require that the Board schedule our Complaint Concerning Work Assignment pursuant to Section 91 of the Act captioned as O.L.R.B. File No. 0013-90-JD for hearing without further delay.

Yours truly,

KOSKIE AND MINSKY

"Stephen Wahl"
Stephen Wahl

2. Counsel has twice indicated that Sheet Metal “requires” the Board to proceed with the complaint in Board File No. 0013-90-JD. It is for the Board to determine whether it will inquire into a complaint concerning work assignment at all, and if it does, how it will do so. The Board is open to suggestions or submissions from parties with respect to how the Board should exercise its discretion in that respect, but no party is in a position to dictate to the Board in that respect.

3. A recurrent complaint from the labour relations community in recent years has been that jurisdictional disputes take too long and are too expensive to litigate before the Board. The community has complained that this situation has developed because the Board has failed to be sufficiently active in directing the proceedings. The Board has been aware of and sensitive to these concerns. It too has experienced some frustration in that respect. Jurisdictional disputes have come to consume an ever increasing and disproportionate amount of the Board’s resources. It has become increasingly apparent that the costs of jurisdictional dispute proceedings, both to the Board and to the parties, often far exceed the value of any benefit derived from them. That situation is rapidly going from bad to worse.

4. Originally, the parties agreed among themselves that it would be appropriate to defer the section 124 proceeding herein pending a determination of the complaint concerning work assignment filed by Sheet Metal. The Board will generally proceed in accordance with an agreement between parties in hearings before it. However, it has become apparent that the nature and diversity of interests involved in disputes concerning work assignments are such that it is unrealistic to expect that either the labour relations community in general, or the parties to a particular dispute are likely to do anything to reverse or stop the escalation in the temporal or financial costs of litigating such complaints. It is therefore appropriate for the Board to look more closely at such proceedings, and, having regard to the discretion which the Board has under section 91 of the *Labour Relations Act*, to be more willing to question and determine how such litigation should proceed.

5. We do not understand Sheet Metal’s assertion that “... it is *not* the grievance filed by Carpenters’, Local 1256 captioned as OLRB File No. 2715-89-G that “raises a spectre of a jurisdictional dispute”.” It is readily apparent that the complaint in Board File No. 0013-90-JD has been filed in response to the grievance referred to the Board in Board File No. 2715-89-G. In that respect, we note that the work in question has been assigned to members of Sheet Metal, the complainant in the jurisdictional dispute proceeding. In addition, whether or not the United Brotherhood of Carpenters and Joiners of America, Local 1256 (“Local 1256”), the applicant in the section 124 proceeding, holds any relevant bargaining rights with respect to Vic-West Steel (Limited) (a respondent in both proceedings) remains an issue in both proceedings, notwithstanding the alteration of Sheet Metal’s position in that respect. In addition to maintaining that Local 1256 holds no relevant bargaining rights, it is now Vic West Steel (Limited)’s position that the Board should proceed to determine that issue first, in the context of the section 124 proceeding.

6. It is implicit in the manner in which the parties have conducted themselves that it is common ground that Local 1256’s grievance constitutes a demand for the work in question. But if Local 1256 does not hold the bargaining rights upon which its grievance is based, its grievance will be dismissed. Since there does not appear to be any competing demand for the work in question independent of Local 1256’s grievance in Board File No. 2715-89-G, there would no longer be a jurisdictional dispute within the meaning of section 91 of the Act.

7. Of course, if its grievance fails, Local 1256 could itself file a complaint under section 91 which, if it proceeded, would raise the same work assignment dispute as the present complaint. However, a very significant difference would be that the issue of Local 1256’s bargaining rights

would have been determined as between the parties. It is true that the existence of bargaining rights is but one factor which the Board considers in determining jurisdictional disputes. However, a review of the Board's jurisprudence makes it readily apparent that it is a very significant factor where one of the trade unions involved holds relevant bargaining rights and the other does not. Consequently, a determination of the bargaining rights question is very likely to put the jurisdictional dispute into different perspective, whichever way it is determined, but particularly if Local 1256 is found to not hold any relevant bargaining rights. Consequently, resolving this issue before proceeding with a jurisdictional dispute may well reduce the costs of any jurisdictional dispute proceeding both to the Board (and therefore the taxpayer) and the parties.

8. In the result, we are not persuaded that it is either necessary or useful to proceed with the complaint concerning work assignment herein at this time. Nor are we satisfied that any prejudice will result to Sheet Metal if the Board proceeds to determine the bargaining rights issue in the section 124 proceeding first, given that the work assignment which is in dispute was made in favour of Sheet Metal and given that Sheet Metal now appears to take no position on the bargaining rights issue.

9. The complaint in Board File No. 0013-90-JD is not being adjourned to the "ionosphere" (defined as the ionized region of the upper atmosphere). At this point the complaint is being adjourned only to another time, not to another place. We also note that proceeding in the manner suggested by Sheet Metal would undoubtedly delay the section 124 proceeding far longer than the jurisdictional dispute complaint will be delayed by disposing of the bargaining rights issue in the section 124 proceeding. (Indeed, it may, as suggested above, obviate the need to proceed with the complaint at all). When the bargaining rights issue is disposed of in the section 124 proceeding, the Board will again assess whether it is necessary or appropriate to proceed with the jurisdictional dispute complaint. The Board is sensitive to Sheet Metal's concern that one proceeding not indefinitely delay another. If any abuse or prejudice becomes apparent in that respect, the Board can reassess the situation and, if necessary, take appropriate action.

10. Accordingly, the Board declines to reconsider its decision dated December 10, 1990 as requested by Sheet Metal.

11. We note that the parties (other than the intervener Sheet Metal it appears) agreed to adjourn the hearing scheduled for December 14, 1990. They also agreed that it should continue on January 28, 1990. Unfortunately, that date is not available to the Board for this matter. Accordingly, the Board directs the Registrar to schedule Board File No. 2715-89-G for hearing, in consultation with the parties, on a date which is available for the Board. Paragraphs 4 and 5 of the Board's December 10, 1990 decision herein will apply with the exception of the reference to the December 14, 1990 date. (We note that Sheet Metal has sought to intervene in the section 124 proceeding. The extent of its right to participate in that proceeding, if any, has not yet been determined. Accordingly, Sheet Metal should be consulted by the Registrar with respect to the scheduling of that matter as directed by the Board above).

COURT PROCEEDINGS

2822-88-R (Court File No. 140/90) Century Fence Limited, Applicant v. United Brotherhood of Carpenters and Joiners of America, Local 27 and Ontario Labour Relations Board, Respondents

Certification - Construction Industry - Employee - Judicial Review - Employer and union meeting with Labour Relations Officer and agreeing on list of employees and all other issues - Union certified without a hearing - Employer seeking reconsideration several months later on basis that it mistakenly agreed to include a foreman on list of employees - Reconsideration declined - Judicial Review dismissed by Divisional Court

Board decision unreported.

Ontario Court of Justice, Divisional Court, Campbell, Austin and McKeown JJ., January 24, 1991.

Campbell J. (endorsement): It was the company itself which originally chose to include Mr. Visconti in the bargaining unit. The board on the basis of the position taken by the employer made the very determination the statute required it to make and it was entitled to act on the basis of the employer's position.

The applicant does not rely on any purported refusal of an adjournment.

The applicants in their letters put to the Board the very argument they now put to this court. It is not the function of this court to re-hear on its merits the application for reconsideration.

The board exercised its jurisdiction in respect of reconsideration and was strongly moved by values such as finality and due diligence.

This application is dismissed. The respondent is entitled to costs. As to quantum they may be spoken to.

2241-86-R (Court File No. 735/89) Ontario Hydro, Applicant v. Ontario Labour Relations Board, The Society of Ontario Hydro Professional and Administrative Employees, Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union Local 1000, The Coalition to stop certification of the Society on behalf of Certain employees, Tom Stevens, C.S. Stevenson, Michelle Morrissey-O'Ryan and George Orr, Respondents v. The Attorney General of Canada, Intervener

Certification - Constitutional Law - Judicial Review - Board determining that it had no jurisdiction over employees working at nuclear generating stations which were federal undertakings pursuant to the *Constitution Act* and s.18 of the *Atomic Energy Control Act* - Divisional Court quashing Board decision - Court of Appeal reinstating Board decision and declaring that *Canada Labour*

Code applies to Hydro employees employed at nuclear facilities coming under s.18 of the Atomic Energy Control Act

Board decision found at [1988] OLRB Rep. Feb. 187; Divisional Court Decision found at [1989] OLRB Rep. June 698.

Court of Appeal, Lacourciere, Tarnopolsky and Galligan JJ.A., January 28, 1991.

TARNOPOLSKY J.A.:

1) The Dispositions Preceding Appeal

This litigation arose as a result of an application for certification under the *Ontario Labour Relations Act*, R.S.O. 1980, c.228 (the "O.L.R. Act"), brought by the Society of Ontario Hydro Professional and Administrative Employees (the "Society"), to enable the Society to become the exclusive bargaining agent for the administrative, scientific and professional engineering employees of Ontario Hydro. The application was supported by the Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union Local 1000 ("CUPE") and by the Intervener, the Attorney General of Ontario. The number of employees in the proposed unit, as set out in the application for certification, was 6646. Some of these were employed at Ontario Hydro nuclear electrical generating stations, whereas others were employed at thermal or hydraulic electrical generating stations.

The application for certification was opposed by a number of employees collectively represented by The Coalition to Stop Certification of the Society on Behalf of Certain Employees (the "Coalition"). They relied upon the declaration in s.18 of the *Atomic Energy Control Act*, R.S.C.1985, c.A-16 (the "AEC Act"), that all works and undertakings involving atomic energy and "prescribed" substances related thereto were "works for the general advantage of Canada", to submit that their labour relations came within the jurisdiction of the *Canada Labour Code*, R.S.C. 1985, c.L-2 (the "Code"). The Coalition asserted, before the Ontario Labour Relations Board (the "OLRB"), that the OLRB has no jurisdiction to deal with persons employed at the Ontario Hydro nuclear facilities at Pickering A and B, Bruce A and B, Rolphoton, and the Darlington construction site.

On 25 February 1988 the OLRB rendered its decision that

there is a category of employee of Ontario Hydro whom we would have no jurisdiction to include in any bargaining unit in this application, namely: all those employed on or in connection with works which by section 17 [now s.18] of the *Atomic Energy Control Act* have been declared to be works for the general advantage of Canada.

Ontario Hydro, joined by the Society and CUPE, then applied to the Divisional Court by way of judicial review for an order quashing the decision of the OLRB, for a declaration that the O.L.R. Act, and not the federal Code, applies to such employees, and for an order directing the OLRB to deal with the certification application of the Society. The Attorney General of Canada intervened to support the OLRB and the Coalition in their opposition to the application. On 12 June 1989 the Divisional Court gave its decision ordering and declaring that:

- a) the decision of the OLRB be quashed;
- b) the OLRB should deal with the certification application;
- c) the federal Code does not apply to Ontario Hydro's employees;

d) the O.L.R. Act applies to nuclear employees of Ontario Hydro who are not otherwise exempt from that Act;

e) the costs of Ontario Hydro, CUPE, the Society and the Attorney General of Ontario be paid by the intervener, the Attorney General of Canada.

With leave of this court, granted 6 November 1989, the Attorney General of Canada, supported by the OLRB, now appeals to this court from the judgment of the Divisional Court, asking that the latter's order and declaration be set aside and the decision of the OLRB restored.

2) The Issue

The issue in this case is whether, by virtue of ss.92(10)(c) and 91(29) of the *Constitution Act, 1867*, the labour relations of the employees sought to be represented by the Society at Ontario Hydro's nuclear facilities at Pickering A and B, Bruce A and B, Ralphton, and the Darlington construction site, come within federal jurisdiction and are subject to the federal Code or are within provincial jurisdiction and subject to the O.L.R. Act either because, by s.92A(1)(c), enacted by the *Constitution Act, 1982*, the provinces were given exclusive jurisdiction with respect to all electrical generating facilities, including those fuelled by nuclear power, or because federal jurisdiction over nuclear facilities does not include jurisdiction over the labour relations of the employees at those nuclear facilities which are involved in generating electricity.

3) The Relevant Constitutional and Statutory Provisions

CONSTITUTION ACT, 1867, as amended

VI.--DISTRIBUTION OF LEGISLATIVE POWERS

Powers of the Parliament

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,--

• • •

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

• • •

Exclusive Powers of Provincial Legislatures.

92. In each Province the Legislature may exclusively make Laws in relations to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,--

• • •

10. Local Works and Undertakings other than such as are of the following Classes:--

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces or extending beyond the Limits of the Provinces;

(b) Lines of Steam Ships between the Province and any British or Foreign Country;

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

• • •

Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

92A. (1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relations to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

• • •

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

ATOMIC ENERGY CONTROL ACT, R.S.C. 1985, c. A-167

WHEREAS it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy and to enable Canada to participate effectively in measures of international control of atomic energy that may hereafter be agreed on;

• • •

18. All works and undertakings constructed

(a) for the production, use and application of atomic energy,

(b) for research or investigation with respect to atomic energy, and

(c) for the production, refining or treatment of prescribed substances,

are, and each of them is declared to be, works or a work for the general advantage of Canada.

CANADA LABOUR CODE, R.S.C. 1985, c. L-2

• • •

INTERPRETATION

2. In this Act,

“federal work, undertaking or business” means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

- (a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,
- (b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,
- (c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,
- (d) a ferry between any province and any other province or between any province and any country other than Canada,
- (e) aerodromes, aircraft or a line of air transportation,
- (f) a radio broadcasting station,
- (g) a bank,
- (h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces and
- (i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces. . . .

• • •

4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

4) The Facts

Ontario Hydro is a corporation governed by the *Ontario Power Corporation Act*, R.S.O. 1980, c.384. Included in its statutory purposes, pursuant to s.56 of that *Act*, are the generation, transmission, distribution, supply, sale and use of electrical power. Ontario Hydro has 68 generating stations, of which 5 are nuclear, with one more nuclear facility under construction, the remaining facilities being thermal and hydraulic. Once generated, electrical power is distributed to municipal public utilities commissions, and to industrial and rural customers, through a province-wide grid of transformer and distribution systems.

The electricity generators are run by steam-driven turbines. In nuclear stations, a CANDU reactor generates the heat necessary to create steam. In *The Nuclear Story*, an Ontario Hydro publication, the function of the CANDU reactor is described as follows at pp.10-11:

... [T]he Candu reactor consists of a large heavily shielded tank called a calandria. Several hundred pressure tubes pass through the tank and bundles of zirconium - sheathed uranium fuel elements are located in these tubes ...

As noted earlier, there is no combustion with uranium fuel, and a fuel bundle comes out of the reactor looking the same as when it when [sic] in.

However, there is one important difference. When a fuel bundle is removed from the reactor after about 18 months of use, it contains radioactive by-products as a result of the fission process.

Plutonium is one such by-product found in the used fuel bundles and is used in weapons or as a nuclear fuel. Hydro does not extract this plutonium. The Candu reactor also produces cobalt-60, a radioactive substance sold as a source of gamma radiation. Plutonium, uranium and cobalt-60 are all “prescribed substances” under the AEC Act.

Hydro also has facilities for extracting deuterium oxide, or “heavy water”, from ordinary lake water. Hydro sells excess heavy water at a profit. The heavy water is used as a moderator in the Candu reactor (to slow down the fission process), and is exposed to neutrons, which convert some of the deuterium into tritium (or Hydrogen-3), a radioactive isotope of hydrogen. The Darlington plant will have the capacity to extract tritium which may then be sold when the appropriate licence is obtained from the Atomic Energy Control Board (the “AECB”). Tritium and deuterium are also “prescribed substances” under the AEC Act.

The operation of a nuclear reactor is heavily regulated by federal legislation, the AEC Act pursuant to that Act, Hydro was required to obtain a licence for each of its nuclear generators. The licence of the Bruce A Nuclear Generating Station in part was submitted in evidence. That licence requires, *inter alia*, that nuclear facilities be maintained to the satisfaction of the AECB; that *employment of certain management and supervisory staff be approved in writing by the AECB*; that at all times there be qualified personnel to ensure the proper operation of the nuclear facility. The licence also requires approval of design modifications and operational changes by the AECB prior to their implementation, and reporting with respect to systems failure, safety, breach of security, “industrial disputes . . . which could affect the safety or security of the nuclear facilities”, etc. The licence also requires that personnel supervising the operation of fissionable substances *shall* have been trained in the fundamentals of radiation protection and criticality control. It is clear from the above that the interest of the federal government in the nuclear facilities of Ontario Hydro is significant.

5) The Judgments Preceding Appeal

a) The OLRB Decision

The OLRB held that by virtue of ss.92(10)(c) and 91(29), Parliament has exclusive legislative authority over local works it declares to be for the general benefit of Canada: *City of Montreal v. Montreal Street Railway*, [1912] A.C. 333 and *Reference Re Waters and Water-Powers*, [1929] S.C.R. 200. The Board noted that Duff J. said, in *Re Legislative Jurisdiction Over Hours of Labour*, [1925] S.C.R. 505 at 511:

It is now settled that the Dominion, in virtue of its authority in respect of works and undertakings falling within its jurisdiction by force of section 91, no. 29, and sec. 92, no. 10, has certain powers of regulation touching on the employment of persons engaged on such works or undertakings.

Accordingly, the OLRB addressed the following question:

... [I]s there a federal work or undertaking upon or in connection with which Ontario Hydro employs any of the employees affected by [the application for certification]?

In order to answer the question, the applicability and validity of s.17 [now s.18] of the AEC Act, as it relates to Hydro, was discussed. The OLRB found that the Candu reactors “produce” and “use” “atomic energy” and “prescribed substances” within the meaning of the AEC Act. As such, s.17 was found to apply to Hydro’s nuclear facilities.

Counsel for Hydro had argued that Hydro was an “undertaking” and not a “work” constructed for

any of the purposes outlined in s.-ss.17(a), (b) or (c) of the AEC Act. The Board acknowledged that the omission of the word “undertaking”, from s.92(10)(c), does put a limit on the declaratory power which cannot be overcome by Parliament declaring an “undertaking” to be a “work”: P. Schwartz, “Fiat by Declaration - s.92(10)(c) of the *British North America Act*” (1960), 2 *Osgoode Hall L.J.* 1. Thus, the Board conceded that an undertaking without works cannot be the object of a declaration under s.92(10)(c). However, it held that a work used by and forming part of an undertaking can be the object of such a declaration. The OLRB ruled further that when Parliament makes such a declaration, its jurisdiction extends to the regulation of the use and management of the works forming part of the undertaking. In support of its position, the OLRB relied on *R. v. Thumler* (1959), 20 D.L.R. (2d) 335 (Alta. S.C.A.D.).

The OLRB rejected Ontario Hydro’s argument that Parliament had jurisdiction to make laws with respect to *some* only of the matters in respect of the declared works -- that is, matters of national interest, such as radiation safety and atomic weapons. It held that Hydro’s position was inconsistent with the preamble of s.91, which expressly gives Parliament legislative jurisdiction with respect to *all* matters in the enumerated classes of subjects. Further, on the strength of *Pronto Uranium Mines v. OLRB et al.*, [1956] O.R. 862 (H.C.) and *Denison Mines Ltd. v. A.-G. Canada*, [1973] 1 O.R. 797 (H.C.), the OLRB found that s.17 of the AEC Act was a valid and proper declaration under s.92(10)(c). Accordingly, the OLRB concluded that Parliament had authority to legislate with respect to Hydro’s labour relations with persons employed on or in connection with those works.

Before the OLRB (as before this court), Ontario Hydro took the position that s.92A excludes any federal jurisdiction over its labour relations, as such jurisdiction would conflict with the power of the provinces to “manage” electrical generating facilities. From Hydro’s perspective, s.17 of the AEC Act became inapplicable to Hydro, at least after s.92A(1)(c) came into effect.

The OLRB held that there is no reason to conclude that, with the words “may exclusively make laws in relation to ...”, s.92A(1) has a meaning or effect different from the same words in s.92. The Board said that ss.92 and 92A must be read in light of s.91, and further, that s.92A(1) is afforded no special status in the *Constitution Act*. The OLRB rejected the argument that s.92(10)(c) declarations cannot extend to matters within s.92A(1), or that a declaration may be made only with respect to matters falling within s.92(10)(c):

... [I]f other enumerated classes of subjects affect section 92(10)(c) in that way, the declaratory power would not just be circumscribed; section 92(16) [“Generally all Matters of a merely local or Private Nature in the Province”] would totally neutralize it.

The Board also held that there was nothing in s.92A(1)(c) which repealed or neutralized the declaration in s.17 of the AEC Act with respect to nuclear generating stations. In short, the Board was of the view that s.92A did not affect the federal declaratory power and that, as a result of that declaration, Parliament obtained jurisdiction over Hydro’s nuclear facilities, including its labour relations in relation thereto.

b) The Divisional Court

The issue before the Divisional Court was: is s.18 of the AEC Act invalid insofar as it purports to declare the operation of Ontario Hydro’s nuclear plants, including labour relations, entirely subject to federal control? None of the parties attacked the basic constitutional validity of the AEC Act under the peace, order and good government power in s.91, but some parties argued that it must be read in conjunction with ss.91, 92 and 92A, under the doctrine of mutual modification.

On behalf of the Divisional Court, Steele J. found that, prior to the enactment of s.92A, it could have been argued that works for the production of electrical energy were local works. However, by the enactment of s.92A, electrical facilities were removed from the category of works contemplated by s.92(10). The learned judge held that the words "such works" [in s.92(10)(c)] referred to local works *and undertakings* within the meaning of s.-s.10, but did not refer to a power specifically granted to a province by s. 92A. In short, no specific and express overriding power was granted to the federal government in s.92A(1), although paramountcy was granted to the federal government with respect to matters falling within s.92A(2) and (3). In fact, Steele J. found that Parliament must have known that, by the enactment of s.92A(1)(c), the generation and production of electrical energy was placed squarely within provincial jurisdiction. Thus, he held that s.18 of the AEC Act does not apply insofar as it purports to declare Hydro's works to be for the general advantage of Canada.

He went on to consider Parliament's jurisdiction to enact the AEC Act in the national interest under the peace, order and good government power set out in the opening words of s.91. Although the learned judge concluded that Parliament had such jurisdiction, he observed that "no reference is made [in the preamble to the *AEC Act*] to the actual development facilities for [atomic energy]" and that "nothing [in the regulations] generally governs the management or labour relations of a facility". He followed Beetz J. in *Bell Canada v. Québec (C.S.S.T.)*, [1988] 1 S.C.R. 749, where it was said at pp.839-40:

How can the exclusive power to regulate these undertakings not include at least the exclusive power to make laws relating to their management? ... [H]ow can the exclusive power to legislate as to management of an undertaking not include the equally exclusive power to make laws regarding its labour relations?

Mr. Justice Steele held that the reasoning in *Bell Canada* was also applicable to matters within exclusive provincial jurisdiction and that, as s.92A(1)(c) gives the province exclusive power to *manage* facilities for electrical energy, the province has the power to legislate with respect to labour relations: "Any inferential transfer of such right to the federal government should not be made in the face of this specific grant." He concluded that the federal government's only involvement with Hydro is through the AEC Act which, from his perspective, deals primarily with health, safety and secrecy in the nuclear area of Hydro's undertaking. Apart therefrom, the core undertaking reviewed as provincial. Accordingly he held that, by the language of s.4 of the *Canada Labour Code*, federal labour legislation did not apply to Ontario Hydro's employees at Hydro's nuclear stations.

Mr. Justice Steele found that the AEC Act met the test relating to the valid exercise of the peace, order and good government power by Parliament, insofar as atomic energy was not a matter that existed at Confederation and is a matter of national concern because of its scale of impact upon the nation. However, he also held that the exercise of the power does not exclude the provincial power, unless expressly so stated by Parliament or by necessary implication. He said at p.24:

... [Section] 18 of the *AEC Act* is ineffective in declaring electrical services to be works of a federal nature and therefore all provincial power is not displaced. There is no duplication of legislation. The aspects differ and therefore the doctrine of double aspect applies

Finally, Steele J. observed that the "peaceful co-existence" of federal and provincial laws has extended over 25 years, and is recognized in the Regulations passed under the AEC Act and in the licence issued to Hydro for the Bruce station. Accordingly, for the Divisional Court, he granted the relief sought by the applicants.

6) The Submissions in this Appeal

The first submission of the appellant, the Attorney General of Canada, is that since s.92(10) of the *Constitution Act, 1867*, grants to the provinces exclusive jurisdiction over local works and undertakings, with the exception of those subject matters enumerated in sub-paras. (a), (b) and (c), and since s.91(29) provides that Parliament has exclusive jurisdiction over such classes of subjects as are expressly excepted from s.92, it flows that works declared under s.92(10)(c) to be for the general advantage of Canada, are subtracted from provincial legislative competence and fall within the authority of Parliament. Therefore, submitted the Attorney General of Canada, since Parliament has made such a declaration in s.18 of the AEC Act with respect to nuclear generating facilities, such facilities are “works” within the meaning of s.92(10)(c) and so, by virtue of s.91(29), are within the exclusive legislative competence of Parliament.

Second, the Attorney General argued that s.92A(1) did not diminish federal power under s.92(10)(c), but confirmed and clarified existing provincial powers over natural resources in the aftermath of the Supreme Court of Canada decisions in *C.I.G.O.L. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545 and *Central Canada Potash Co. Ltd. v. Government of Saskatchewan et al.*; [1979] 1 S.C.R. 42. It was argued further that the Divisional Court erred by holding that s.92A(1)(c) removed all electrical generating facilities from s.92(10)(c) local works, because this failed to distinguish between the activities concerning those facilities, i.e. development, conservation and management, and the nature or character of those facilities, being “local works”.

Third, the Attorney General submitted that s.92A(1) is afforded no special position in relation to the other provisions of the Constitution. In support of that position, the Attorney General relied on *Reference Re an Act to Amend the Education Act* (1986), 53 O.R. (2d) 513 (C.A.) at 556; aff'd [1987] 1 S.C.R. 1148, as well as the express wording of the *Constitution*. Specifically, reliance was placed upon the opening words of s.91, which state that the powers enumerated therein (including s.91(29)) are within the exclusive jurisdiction of Parliament “notwithstanding anything in this Act”. There is no reason to exclude s.92A from the effect of those words as it is clearly part of “this Act”, i.e. the *Constitution*.

Fourth, the Attorney General argued that Parliament’s jurisdiction over nuclear facilities is founded on the peace, order and good government power set out in the opening words of s.91, and that the Divisional Court was in error in holding that that power is limited by s.92A(1)(c).

Fifth, the Attorney General took the position that Parliament, having exclusive jurisdiction over nuclear generating facilities by virtue of the declaration in s.18 of the AEC Act, thereby has jurisdiction to regulate labour relations at nuclear generating facilities, because labour relations are an essential and integral part of the management of these works and undertakings. In support of that position the Attorney General relied in *Bell Canada v. Québec (C.S.S.T.)*, *supra*. Further, it was submitted that since the *Canada Labour Code*, by s.4 thereof, is expressly applicable to employees employed upon or in connection with any federal work or undertaking, the inescapable conclusion is that the employees working at Hydro’s nuclear facilities fall within the *Code*’s purview.

Sixth, the Attorney General asserted that, as Hydro is not a Crown corporation, it is not immune from the operation of federal legislation. However, it was added, even if it were such a corporation, it is not immune because the legislation in question is a valid exercise of Parliament’s power.

In response, the respondents (Ontario Hydro, CUPE and the Society), and the Intervener, (the Attorney General of Ontario), submitted, first, that s.92A(1)(c) confers jurisdiction over all generating facilities, including those fuelled by nuclear power. On behalf of Ontario Hydro it was pointed out that the drafters of s.92A must have been aware of the extent of electrical production

provided by nuclear generation at the time the amendment was contemplated, and thus, intended to include nuclear facilities under s.92A(1)(c). Further, it was submitted, on the strength of the Supreme Court's decision in *Bell Canada v. Québec (C.S.S.T.)*, *supra*, that the word "management", contained in s.92A(1)(c), grants to the provinces jurisdiction over labour relations at all of Hydro's electrical generating facilities.

Second, the respondents submitted, Parliament cannot use the declaratory power in s.92(10)(c) to strip a province of jurisdiction granted under a specific head of power, such as s.92A(1)(c). For its part, the respondent CUPE argued that to allow such use of the declaratory power would be contrary to the doctrine of mutual modification. As a result, it was argued, the declaratory power is limited to those matters falling within s.92(10) -- local works and undertakings. Therefore, prior to the enactment of s.92A(1)(c), no provincial power, apart from s.92(10)(c), was explicitly directed at electrical generating stations. Parliament could thus assume jurisdiction over them pursuant to a declaration under s.92(10)(c), which it did in s.18 of the AEC Act. However, it is said, s.92(10)(c) and s.18 of the AEC Act must now be interpreted in light of s.92A(1)(c). In short, it is the position of this respondent that, since no declaratory power is granted to the federal government in s.92A(1), no declaration could be made in respect of electrical generating facilities. Hydro's nuclear facilities could not become "federal works, undertakings or businesses" within the meaning of the *Canada Labour Code*, and any federal legislation on that subject would be limited to its federal aspect pursuant to the peace, order and good government power under s.91. Even then, it was argued by CUPE, the labour relations of Ontario Hydro do not form part of the indivisible and distinctive nature of "national concern". Ontario Hydro argued, further, that the AEC Act does not treat labour relations as a matter of national concern, nor is there any suggestion that the Act could not attain its objects without the exercise of federal power over labour relations.

According to the respondents, hence, the trilogy of *Bell Canada v. Québec (C.S.S.T.)*, *supra*; *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897; and *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868, which held that provincial labour laws do not apply to federal works and undertakings, has no application to the facts of this case. In short, it was said that, because nuclear generating stations are within the exclusive jurisdiction of the provinces by virtue of s.92A(1)(c), and since s.2 of the *Canada Labour Code* provides that the Code applies to "federal works, undertakings, or businesses" which are outside the exclusive legislative authority of the provinces, then that *Code* cannot apply here, as the nuclear generating facilities cannot be said to be outside the exclusive legislative authority of the province.

Further, Ontario Hydro argued that, in any event, it is a provincial instrumentality and is thus immune from federal legislation. The scheme of the constitution, it was asserted, is that each order of government should operate within its sphere and that neither order should be presumed to intend to regulate the instrumentalities of the other.

For the aforementioned reasons, the position of the respondent Ontario Hydro was that the OLRB did have jurisdiction to consider the certification of all employees.

7) Judgment

It is not disputed that, pursuant to s.92(10)(c) of the *Constitution Act, 1867*, as amended, Parliament has validly declared atomic energy to be for the general advantage of Canada by means of s.18 of the AEC Act. Nor is it disputed that nuclear electrical facilities produce and use atomic energy within the meaning of the AEC Act and, accordingly, *prima facie* fall within the ambit of that Act. The main issue in this appeal is whether such a declaration extends to matters within s.92A(1) or whether, by the enactment of s.92A, electrical facilities were removed from the category of works contemplated by s.92(10) and, hence, the declaration in s.18 of the AEC Act no

longer applies to Ontario Hydro's nuclear generating facilities. The alternative issue is whether, even if s.18 does apply to Ontario Hydro's nuclear generating facilities, this extends to the labour relations of the employees of the facilities.

a) Section 92A

The respondent, Ontario Hydro, argued that when s.92A(1)(c) came into force, the provinces already had exclusive jurisdiction over hydraulic and thermal electrical generating stations and thus, s.92A(1)(c) was intended to extend to all electrical facilities including nuclear generators. Further, Hydro argued that at the time s.92A(1)(c) came into force, 31.2% of electrical energy in Ontario was provided by nuclear facilities. Counsel for Hydro concluded, therefore, that s.92A(1)(c), covering all electrical generating stations, must have been intended to include nuclear stations by its very language.

There is little support for this position. The OLRB, in its reasons, found:

The only information we have before us about [the process by which s.92A was added to the Constitution] is that found in [a list of scholarly] writings .. None of those writings supports the view that s.92A was understood or expected to have any direct effect on the scope of the federal declaratory power. Indeed, Messrs. Meekison and Romanow ... record that, in the federal-provincial conferences which led to adoption of the language now in section 92A, the western provinces expressly sought limits on the federal government's declaratory power in relation to natural resources, but ultimately failed to achieve that objective.

Some of the academic writing at the time of the enactment of s.92A, as well as the discussions of the Special Joint Committee of the Senate and House of Commons of the Constitution of Canada, make it plain that the constitutional amendment was intended to add to and strengthen the powers of provinces to manage trade in resource products extracted in the province. The new provision was enacted after the Supreme Court of Canada handed down its decisions in the *CIGOL* and *Central Canada Potash* cases, *supra*. Critics of and commentators on these cases wrote that those two cases effectively expanded federal jurisdiction, particularly its trade and commerce power in s.91(2), at the expense of provincial legislative competence over natural resources within their boundaries. The desire of the provinces to increase their control over natural resources through constitutional amendment was reflected in the unanimous agreement to that effect at the Annual Premier's Conference in 1978. However, the extent to which the federal government would play a role in resource management was uncertain. [On this history see Ian Bushnell, "The Control of Natural Resources through the Trade and Commerce Power and Proprietary Rights" (1980), 6 *Canadian Public Policy* 313. See also Cairns et al., "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985), 23 *Osgoode Hall L.J.* 253.]

The first attempt at constitutional amendment was made in what is known as the "Best Effort" draft of the Attorneys General of Canada in 1979. However, that draft -- which, *inter alia*, preserved concurrency for federal legislative jurisdiction, but granted to the *provinces* paramountcy over conflicting federal legislation in relation to interprovincial trade in resource production -- was withdrawn in 1980 after federal support for it waned [Cairns et al., *supra*, at pp. 264-66]. Later in 1980, the text of s.92A was introduced by the federal New Democratic Party. Professor Cairns wrote at p.266:

Section 92A represents a re-drawing of the boundaries of federal-provincial legislative authority in relation to natural resources. Unlike the 1979 *Best Effort* draft proposals, however, section 92A does not confine federal powers in any way although it does confirm and enhance provincial powers.

Referring to the situation prior to the 1982 amendment, Professor Hogg, *Constitutional Law of*

Canada, 2nd ed., (1985) at 596 asserted that the provinces had jurisdiction over hydro-electricity "because dams, generating stations and distribution systems are 'local work and undertakings' within s.92(10) of the Constitution Act, 1867". The learned author opined further that other kinds of electricity, *with the exception of nuclear energy*, would be governed by similar principles. Nuclear generated electricity was said to fall within federal jurisdiction by virtue of the declaration in s.17 [now s.18] of the AEC Act. Hogg wrote, at p.585:

This declaration was ... an exercise of the declaratory power under s.92(10)(c) of the Constitution Act, 1867, and it had the effect of shifting the declared works from provincial to federal jurisdiction ...

In referring to scholarly writings on the significance of the amendment of the *Constitution Act, 1867*, with the addition of s.92A by the *Constitution Act, 1982*, I am mindful that the Supreme Court of Canada has emphasized that, although constitutional interpretation should not be determined by a particular speech or opinion, it is appropriate to consider the historical background that led to the enactment of the particular provision sought to be interpreted. See *Reference Re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54 at 66; *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206 at 225; and *Reference Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 505-509. It is for that historical background that I will now consider the pertinent parts of the proceedings of the Special Joint Committee on the Constitution.

The discussions in the Special Joint Committee on the impact of s.92A on the distribution of powers also run counter to the position of the respondents. The Minutes make it plain that s.92A was *not* intended to occupy any special position *vis-à-vis* s.91 or s.92. Moreover, it was repeatedly stated that s.92A, as a matter of interpretation, would have to be read in light of the other provisions of the *Constitution Act, 1867*. Nowhere was it said that the constitutional amendment was intended to grant the provinces absolute power over the matters enumerated therein. In the following exchange, the latter assertion is made clear:

Mr. Hawkes at p.54:29:

If I can go back to proposed [s.92A(1)] ... it gives exclusive jurisdiction to the provinces over development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

• • •

I am interested in the legal interpretation as to whether or not this is an attempt to confer on the provinces the right to do what they like, in terms of electrical generation, with bodies of water even though those cross provincial boundaries?

Mr. Strayer:

The text really relates to the generation site of the facility itself and not the body of water which is used to generate the electricity.

• • •

Of course, *like any other power in the constitution it would have to be interpreted in light of other provisions of the constitution*. This is an exclusive provincial power. There are other exclusive federal powers, such as the federal jurisdiction over navigation.

This will have to be interpreted side by side with the federal power of navigation *and neither one could be applied to the complete abolition of the other*.

It is a problem familiar to constitutional lawyers trying to interpret one section like this in the light of another one.

[Emphasis added]

Specific questions were raised in the Committee as to whether Parliament's legislative competence over nuclear energy would continue after s.92A was in force. From any reading of the dialogue one can only conclude that it was fully understood that nuclear generating stations were and would continue to be works declared to be for the general advantage of Canada pursuant to s.92(10)(c) of the *Constitution Act, 1867* and s.18 of the AEC Act. The point was barely debated:

Mr. Hawkes [at p.54:29]:

Let us move to ... [nuclear generation].

• • •

It is conceivable that ... Parliament ... might decide that in Canada they did not want any more nuclear power stations built.

If that decision were taken by ... Parliament ... could it be overturned by a particular province which wanted, because of this clause, to proceed with the building of nuclear power stations?

Mr. Strayer [at p.54:30]:

At the moment nuclear power stations are declared to be for the general advantage of Canada under the *Atomic Energy Control Act*. That situation would still continue until Parliament otherwise provides.

Mr. Hawkes:

• • •

In the constitution you are saying that there is no legal basis for argument under this provision, to have that act overturned by a province?

Mr. Chrétien:

No it cannot; because this was introduced under another section of the constitution which remained there, that gave that power to declare the atomic energy -- works for the general advantage of Canada.

• • •

... [I]f ever we were to withdraw that legislation it will become completely under the authority of the province and they would have the constitutional authority.

[Emphasis added]

Later, the following discussion arose, which firmly establishes the preservation of federal paramountcy. Perhaps it is worth reiterating that, although s.92A was intended to add to and strengthen the management powers of the provinces with respect to natural resources, nothing was said to the effect that the amendment would "subtract" from existing federal powers.

Senator Austin [at p.54:60]:

... What we have before us is an amendment to s.92, which is subject to the general powers and the "notwithstanding" clause in s.91.

[at p.54:62]

The issue that Mr. Fraser has put before us is whether in any way the Broadbent amendment which is being placed before this Committee last evening could have a deleterious effect on the constitutional power of the federal government to control the fisheries interests in British Columbia ... I believe the amendment which Mr. Broadbent has before us now is always subject to the notwithstanding clause in section 91 which in effect ... says that notwithstanding any of the provisions of s.92, *and this is an amendment ... to s.92* ... the specific heads of power of the federal government under section 91 ... will prevail.

[Emphasis added]

Mr. Chrétien [at p.54:75]:

On the technical grounds, perhaps I could ask Mr. Strayer to give you some explanation on the relationships between ss.91 and proposed s.92A.

Mr. Strayer:

The matters referred to in proposed 92A(1) ... are described as exclusive powers of the provincial legislatures just as the matters in section 92 are now described as exclusive powers of the provinces.

There is a well recognized relationship between the exclusive powers of parliament in section 91 and the exclusive powers of the legislatures in s.92.

• • •

Now it is our belief that that relationship which has existed between sections 91 and 92 will also exist between ss.91 and proposed section 92A(1). That means any laws made under section 91, if they come into conflict with the powers proposed under the powers under proposed section 92A(1), will prevail over those provincial laws ... to the extent that there is a conflict.

[Emphasis added]

Academic commentators shared the views expressed above by members of the Special Joint Committee -- that is, that the legislative powers in s.92A cannot be exercised to the exclusion of other federal powers. [See Cairns, Chandler and Moull, "Constitutional Change and the Private Sector: The Case of The Resource Amendment" (1987), 24 *Osgoode Hall L.J.* 299 at 303]. Professor Hogg was of the view that the principles governing the distribution of powers with respect to electrical facilities were not likely altered by the enactment of s.92A(1)(c). In fact, he wrote, *supra*, at p.597:

As a general proposition, this provision [s.92A(1)(c)] is declaratory of the pre-1982 law. However, it contains no express exception for the case where electricity is generated [*inter alia*] from nuclear power. It seems plausible to read these exceptions into the new provision.

It is, therefore, difficult to conclude, as did the Divisional Court, that by the enactment of s.92A, works for the production of electrical energy were removed from the category of "works" contemplated by s.92(10).

In my opinion the Attorney General of Canada was correct in asserting that the Divisional Court erred by failing to distinguish between the *activities* concerning facilities for the generation and production of electrical energy referred to in s.92A(1)(c), (*i.e.*, development, conservation and management), and the *character* or *nature* of those facilities (*i.e.*, being "local works"). The specific power granted to the provinces under s.92A(1)(c) relates to *development, conservation and management* of the works which produce electrical energy. There is nothing in the working of that provision that leads to the conclusion that s.92A was intended to grant the province absolute legis-

lative competence over the physical shell or works for electrical generation. Undoubtedly, if the drafters had meant to do so, the constitutional amendment might have read:

92A. (1) In each province the legislature may exclusively make laws in relation to

...

(c) works in the province for the generation and production of electrical energy and for the development, conservation and management of those works.

The drafters did not, however, make such express provision. Accordingly, one cannot presume that the enactment of s.92A had such an effect.

Further, although Mr. Finkelstein, on behalf of Ontario Hydro, argued before this court that the drafters must have been aware of the amount of electricity produced by way of nuclear generation, and must have intended to place jurisdiction in relation to such "works" within provincial jurisdiction by enacting s.92A, there is nothing to support that proposition. More than that, it is equally plausible and supported by the historical record that, having knowledge of the declaration in the AEC Act, the drafters of s.92A did not intend to grant to the provinces jurisdiction over works *already* declared to be for the general advantage of Canada. In other words, it was likely presumed that federal jurisdiction over atomic energy, including Hydro's nuclear facilities, would continue notwithstanding the constitutional amendment.

Since the wording of the amendment fails to support the conclusion that electrical facilities were removed from the category of works contemplated by s.92(10), it seems to me irrelevant that no overriding power was granted to the federal government under s.92A(1) with respect to the matters enumerated therein. Such an override was not necessary. Parliament could assume jurisdiction over Hydro's nuclear generating facilities pursuant to its declaratory power in s.92(10)(c), as it did in 1946 with the passing of the AEC Act.

If the court were to accept the respondents' arguments that the declaratory power is not a general exception to the provincial heads of power, but is rather an exception *only* to the provincial legislative authority over "local works and undertakings" in s.92(10), an absurdity would result. The jurisdictional basis of a matter over which a province has legislative competence may arise from any number of heads of power. Indeed, beyond the obvious head of power (s.92A), provincial jurisdiction with respect to natural resources may arise from s.92(5) -- Public Lands, s.92(13) -- Property and Civil Rights and/or s.92(16) -- Matters of Local or Private nature. There is no authority which claims that legislative competency over a particular subject-matter must be founded on or is restricted to one head of provincial power without more. Therefore, I would endorse the finding of the OLRB that, if the declaratory power refers to local works or undertakings *only*, then s.92(16) - - "Generally all Matters of a merely local or private Nature in the Province" -- would neutralize Parliament's power to declare anything to be for the general advantage of Canada, for undoubtedly a local work could reasonably be found to be a matter of a local or private nature in the province. It is that absurdity which must be avoided.

I do not think that the words "the legislature may exclusively make laws", in s.92A, support the position advanced by the respondents, that the amendment removed "works" related to electrical production from s.92(10) -- "local works", or that s.92A is somehow immune from the operation of ss.92(10)(c) and 92(29). The same wording appears in the opening to s.92. However, it is a well-established principle of constitutional interpretation that s.92 -- and I would include the amendment thereto -- must be read in light of s.91 and other provisions of the *Act* (the doctrine of mutual modification). See *Reference Re Waters and Water-Powers*, *supra*, at 216; *Great West Saddlery Co. Ltd. v. The King*, [1921] 2 A.C. 91 at 116 (J.C.P.C.); and *Reference Re Validity of Industrial Relations*

and Disputes Investigations Act, [1955] S.C.R. 529 at 541-42, where Taschereau J. said, citing Lord Haldane in *Paquet v. The Corporation of Pilots for and below the Harbour of Québec*, [1920] A.C. 1029 (J.C.P.C.):

... [T]he language of s.92 has to be read with that of s.91, and the generality of the wording of s.92 has to be interpreted as restricted by the specific language of s.91

...

Moreover, it is equally settled that Parliament, through the *valid* exercise of its legislative powers and not for a “colourable” or improper purpose, may touch on those classes of subjects assigned “exclusively” to the provinces: *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373. A declaration pursuant to s.92(10)(c) is an obvious example of such federal incorporation of matters otherwise within “exclusive” provincial jurisdiction: *Reference Re Waters and Water-Power*, *supra*. The drawing of lines of power between the two orders of government has never been thought to be an exact science [see *John Deere Plow Co. v. Warton*, [1915] A.C. 330 at 338] and the matter before this court may be a case in point.

b) The Application of s.18 to Ontario Hydro’s Facilities

It is well settled that, by virtue of ss.91(29) and 92(10)(c), works or undertakings declared to be for the general advantage of Canada are withdrawn from provincial legislative competence: *Reference Re Water Powers*, *supra*, at p.220. However, it was argued by counsel for Ontario Hydro that s.18 of the AEC Act must be read in light of s.92A of the Constitution and that, as a result of the amendment granting legislative authority over electrical generating facilities, the relevant provision of the AEC Act no longer extends to matters within s.92A(1)(c).

The validity of the declaration under s.18 of the AEC Act has come before Ontario courts on two separate occasions. On the first, *Pronto Mines v. O.L.R.B.*, *supra*, McLennan J. held that the AEC Act fell within the power of Parliament to make laws for the peace, order and good government of Canada insofar as “atomic energy” was found to be a subject-matter beyond local or provincial concern and of concern to the country as a whole. This was so notwithstanding that, in some aspects, the legislation touched on matters specifically reserved for the provinces. At p.869, the learned judge said:

The preamble to the *Atomic Energy Control Act* states two reasons for the *Act*, namely, that it is essential in the national interest to control and supervise atomic energy, and also to enable Canada to participate in measures for the international control of that energy. The real subject-matter of the legislation is the control of the *production and application* of atomic energy and that control is exercised from the state of discovery of ores up to its ultimate use *for whatever purpose*, be it *civil or military*.

It was not suggested ... and I do not think it could be suggested, that this was a colourable attempt to acquire and impose a control over an area of activity which would be in derogation of provincial jurisdiction.

[Emphasis added]

Although the legislative competence of Parliament to pass the AEC Act (including s.18), under s.92(10)(c), was not considered in *Pronto Mines*, it was in the second case -- *Denison Mines Ltd. v. A.-G. Canada*, *supra*. In that case, it was held that Parliament had authority to decide whether a work or class of works is for the general advantage of Canada and that s.17 [now s.18] was a valid or proper declaration pursuant to s.92(10).

Since there is nothing to indicate that works within s.92A were removed from the class of works in

s.92(10), then there is nothing to preclude the declaration in s.18 of the AEC Act from applying to Hydro's nuclear facilities. The declaration has the effect of granting Parliament control over these works.

It was argued further that Ontario Hydro, as a provincial instrumentality, was immune from federal legislation "unless there is an express statement or necessary implication to the contrary in the federal law". It was argued, further, on the strength of *Smith et al. v. Hydro-Electric Power Commission* (1976), 14 O.R. (2d) 502 at 505-6, that Ontario Hydro is a public authority created to perform a public function and, in light of the Constitution, wherein distinct federal and provincial spheres are created, Parliament should not be presumed in the AEC Act or the Labour Code to have intended to regulate this corporation.

However, in view of the conclusion I have reached and in light of the extensive provisions in the AEC Act regulating Hydro's nuclear facilities, it is difficult to understand how it can be argued that Parliament should not be presumed to have intended to regulate this instrumentality. I would have thought the contrary to be self-evident, i.e., that the AEC Act, by necessary implication, if not also by express provision, indicates Parliament's intent to regulate those aspects of Hydro's nuclear activities which fall within federal jurisdiction. Further, I agree with the submissions of counsel for the Attorney General of Canada that where, as here, the legislation in question is a valid exercise of Parliament's powers, then Hydro, notwithstanding its public nature, is not immune from the application of federal legislation: *Reference Re Anti-Inflation Act*, [1976] S.C.R. 375 at 429-30; *Her Majesty in Right of the Province of Ontario v. The Board of Transport Commissioners*, [1968] S.C.R. 118 at 123; *Her Majesty in Right of the Province of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61 at 72.

c) Section 91 - Peace, Order and Good Government

Even if one were to concede that s.92A removed electrical generating "works" from the category of "works" contemplated in s.92(10), Parliament's jurisdiction over Hydro's nuclear facilities could be founded in its power in the opening words of s.91 to make laws for the peace, order and good government of Canada. The preamble to the AEC Act reads, in part:

Whereas it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy and to enable Canada to participate effectively in measures of international control of atomic energy that may hereafter be agreed upon

The legislative competence of Parliament to enact laws concerning atomic energy under the peace, order and good government power was, as stated above, considered in *Pronto Mines* and *Denison Mines*. In the former case, McLennan J. quashed two decisions of the OLRB certifying the Canadian Mine Workers Union as the bargaining agent for the employees of Pronto Mines and Rio Algom Mines, on the ground that the Board had no jurisdiction to entertain the application. The court held that Parliament's jurisdiction with respect to atomic energy, *be it civil or military*, was founded on the "national concern" branch of the peace, order and good government power as laid down by Viscount Simon in *Attorney-General for Ontario et al. v. Canada Temperance Federation et al.*, [1946] A.C. 193 at 205-6. Even if the judgment of Beetz J., in the *Anti-Inflation Act Reference*, *supra*, at 454-9, for the majority on this point, limited the "national concern" branch of the peace, order and good government clause to a matter which "was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters". atomic energy meets this test. Furthermore, in the *Pronto Mines* case, McLennan J. found that Parliament's power to legislate with respect to atomic energy must include jurisdiction over labour relations. He said, at pp.869-70:

.. [I]t would be incompatible with the power of Parliament to legislate with respect to the control of atomic energy for the peace, order and good government of Canada if labour relations in the production of atomic energy did not lie within the regulation of Parliament.

There is no question that, *generally*, the regulation of labour relations is a matter within provincial jurisdiction under s.92(13) -- property and civil rights. However, I agree with the submissions of the Attorney General of Canada that the regulation of atomic energy, as a matter of national concern, must include the labour relations of Ontario Hydro's nuclear facilities, in spite of the practical difficulties that may be encountered as a result of this decision.

In the Divisional court, Steele J. said:

... [A]t the present time the *AEC Act* and Regulations relate only to health, safety and secrecy. It cannot be said that all labour relations are "vital", "essential" or "integral" to [Hydro's] undertaking.

With respect, I do not share that view. Under the *AEC Act*, it is clear that the powers granted to the Board encompass not only the authority to ensure the safe operation of Hydro's nuclear stations, but also to ensure that qualified personnel attend at the facilities. Subsection 9(b) of the *AEC Act* provides:

9. The Board may ... make regulations

...

- (b) for developing, controlling, supervising, and licensing the production, application and use of atomic energy.

[Emphasis added]

The powers granted to and the actual exercise of these by the Board, in issuing licences to Hydro's nuclear works -- which, as pointed out above, provide for the regulation of employment of persons at nuclear stations as well as the operation of the works as a whole -- firmly establish the intricate link between the safe and effective operation of the nuclear facilities and the necessity of Parliamentary control over persons employed at Hydro's nuclear facilities. On that note, there appears to be no reason to depart from the holding of McLennan J. in *Pronto Mines* that Parliament's authority to regulate nuclear works includes labour relations.

Finally, I agree with the decision of the OLRB and the submissions of the appellant that s.92A does not detract from the scope of Parliament's authority to make laws for the peace, order and good government of Canada. Referring again to the discussions in the Special Joint Committee, it will be recalled that s.92A was to be afforded no special position *vis-à-vis* other provisions of the Constitution, but was viewed rather as an *amendment* to s.92. Accordingly, no significance is attached to the fact that the grant of power to the provinces under s.92A is expressed to be "exclusive". As pointed out earlier, all provincial powers conferred under s.92 are expressed to be "exclusive". Nevertheless, they are not immune from the peace, order and good government power in s.91. In short, there is nothing in the wording of s.92A to support the conclusion reached by the Divisional Court that the exclusive federal jurisdiction over nuclear energy, founded on the peace, order and good government power, is limited by s.92A(1)(c) of the *Constitution Act, 1982*.

d) Application of the Labour Code

Relying on s.2 of the *Canada Labour Code*, the respondents argued that the Code does not apply in the circumstances of this case because nuclear generating stations are within exclusive provincial

jurisdiction pursuant to s.92A(1)(c). They argued, further, that because s.4 of the Code applies to “federal works, undertakings or businesses” within the meaning of ss.2(h) and (i) of that statute, and because s.2(i), by implication, excludes the application of the Code where works and undertakings fall within the legislative competence of a province, the employees at Hydro’s nuclear generating facility are not regulated by the Code.

In view of the conclusion I have reached earlier -- that the constitutional amendment did not remove works in s.92A(1) from the class of subjects in s.92(1), and that the declaration in s.18 of the AEC Act validly applies to Hydro’s nuclear facilities -- the respondent’s position cannot be correct in law. A declaration with respect to works for the general advantage of Canada brings those works within the exclusive jurisdiction of Parliament by virtue of s.91(29). Accordingly, it cannot be said that Parliament’s jurisdiction with respect to such works is merely ancillary or incidental; rather, this matter is one over which Parliament has primary jurisdiction.

The opening words of s.91 state that the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects in s.91. This includes those classes of subjects coming within Parliament’s legislative competence circuitously, *i.e.* by s.92(10)(c). By the very language of s.91, it would be inconsistent to conclude that Parliament has legislative competence in relation to only *some* matters falling within s.91(29), when the wording of s.91 clearly indicates that Parliament has jurisdiction over all matters enumerated therein.

It is worthwhile considering the above in conjunction with the following submissions. It was submitted by counsel for the Attorney General of Canada that the declaration in s.18 placed within Parliament’s legislative jurisdiction not merely the physical works connected with Hydro’s nuclear activity, but also the power to regulate the operation of that work. Indeed, both Hogg, *supra*, at p.492 and Finkelstein, *Laskin’s Canadian Constitutional Law*, vol. 1, 5th ed. (1985) at pp. 628-29 agree that the result of a declaration under s.92(10)(c),

must surely be to bring within federal authority not only the physical shell or facility, but also the integrated activity carried therein; in other words, the declaration operates on the work in this functional character.

[Emphasis added]

This proposition is supported by *R. v. Thumlert*, *supra*, where it was found that jurisdiction over a feed mill, subject to a s.92(10)(c) declaration, extended not only to the mill itself, but to its operational components. Ford C.J.A. wrote:

Parliament ... proceeded to treat [the elevators brought within federal jurisdiction pursuant to ss.92(10)(c) and 91(29)] as part of a system for regulating and controlling the export of grain interprovincially and internationally in the way provided by the *Canadian Wheat Board Act* through the Canadian Wheat Board, which was incorporated ... with the object of marketing in an orderly manner ... and [which was] given express powers as well as “powers necessary or incidental for the purpose of carrying on its operations”.

[Emphasis added]

It has long been suggested that legislative jurisdiction over works and undertakings includes the power to regulate those matters touching on the employment of persons engaged on such works and undertakings [*per* Duff J., in *Re Legislative Jurisdiction Over Hours of Labour*, *supra*], notwithstanding that, as a general proposition, labour relations fall within provincial authority under s.92(13) -- Property and Civil Rights: see *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 at 131-33, *per* Dickson J. That suggestion was confirmed by the Supreme Court of Canada in the trilogy of cases mentioned above: *Bell Canada v. Québec*, *supra*;

Canadian National Railway Co. v. Courtois, *supra*; and *Alltrans Express Ltd. v. B.C. (Workers' Compensation Bd.)*, *supra*. Those cases all dealt primarily with the issue of whether provincial statutes regulating health and safety in the work place, are applicable to a federal undertaking.

For our purposes, Beetz J. in *Bell Canada* exhaustively reviewed the development of the law on this issue and, therefore, it need not be repeated here. That court held unanimously that, with respect to federal undertakings within the meaning of ss.92(1)(a), (b) and (c), working conditions and labour relations are matters within the classes of subjects mentioned in s.91(29) and, consequently, within the exclusive jurisdiction of Parliament. In *Reference Re Validity of the Industrial Relations and Disputes Investigations Act*, *supra*, Abbott J. held, at p.592:

The right to strike and the right to bargain collectively are now recognized, and the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament, lies with Parliament and not with the Provincial Legislatures.

Mr. Justice Beetz, speaking for the court in *Bell Canada* at p.825, said that the quoted words of Abbott J. were "practically a classic statement on point". At p.833, he went on to say:

... [T]he exclusivity rule ... does not apply only to labour relations or to federal undertakings. *It is one facet of a more general rule against making works, things or persons under the special and exclusive jurisdiction of Parliament [by way of s.91(29)] subject to provincial legislation, when such application would bear on the specifically federal nature of the jurisdiction to which such works, things or persons are subject.*

[Emphasis added]

And, at pp.839-40, Beetz J. held:

Martland J. [in *Commission du Salaire Minimum v. Bell Telephone Co. of Canada*, [1966] 1 S.C.R. 767 at 771-7] considered that the management of these undertakings and their labour relations are matters which are part of this basic and unassailable minimum, as these matters are essential and vital elements of any undertaking. How is it possible to disagree with this? How can the exclusive power to regulate these undertakings not include at least the exclusive power to make laws relating to their management? ... [H]ow can the exclusive power to legislate as to management of an undertaking not include the equally exclusive power to make laws regarding its labour relations? To deny this, as the critics have done, is to strip the exclusive federal power of its primary content and transform it simply into a power to make ancillary laws connected to a primary power with no real independent content, apart from the power to regulate rates and the availability and quality of services such as telephone services or railway services. The latter undoubtedly fall within the exclusive classes of subject represented by such federal undertakings, but there is nothing in the constitutional provisions, rules or precedents to indicate that the exclusive legislative authority of Parliament must or may be confined to so narrow a field.

There appears to be no reason why the principles applied in *Bell Canada v. Québec (C.S.S.T.)* should not apply with equal force to the facts of this case.

In conclusion, Ontario Hydro's nuclear facilities are works that, although wholly situate within a province, are declared by Parliament to be for the general advantage of Canada within the meaning of s.2(h) of the Code. As indicated above, by s.4 Parliament has expressly made the Code applicable to all employees who are employed upon or in connection with such works as defined in s.2. Ontario Hydro's nuclear workers, accordingly, must be governed by the federal Code.

8) Disposition

I would allow the appeal and set aside the decision of the Divisional Court. In its place I would order that the decision of the OLRB be re-instated and would declare that the *Canada Labour Code* does apply to employees of Ontario Hydro who are employed in those nuclear facilities that come under s.18 of the *A.E.C. Act*. I would, further, set aside the costs order of the Divisional Court and would order that there be no order as to costs here or below.

GALLIGAN J.A.: (dissenting)

In this appeal it is necessary to decide whether the Province's right to regulate labour relations at all of the operations of Ontario Hydro ("Hydro") in Ontario is partially invalidated by the federal government's right to regulate atomic energy at Hydro's five nuclear power generating stations.

At the outset a brief history of this litigation is in order. On November 18, 1986 the Society of Ontario Hydro professional and Administrative Employees (the "Society") applied to the Ontario Labour Relations Board (the "Labour Relations Board") for certification as bargaining agent for the administrative, scientific and professional engineering employees of Hydro throughout Hydro's operations in Ontario. An organization calling itself the Coalition to Stop Certification of the Society on Behalf of Certain Employees (the "Coalition") filed an objection and the Labour Relations Board gave it status as an objector. The Coalition objected to the jurisdiction of the Labour Relations Board on the ground that some of the employees who would be covered by the proposed certification worked in Hydro's nuclear generating stations and should, therefore, be subject to the *Canada Labour Code* R.S.C. 1985, c.L-2 rather than to the *Ontario Labour Relations Act* R.S.O. 1980, c.228. The objection was based upon the contention that regulation of the nuclear generating stations was under the federal government's exclusive jurisdiction over atomic energy and that such jurisdiction included exclusive power to legislate with respect to labour relations. This contention found favour with the Labour Relations Board which held that regulation of the nuclear generating stations was exclusively within federal legislative jurisdiction including jurisdiction to legislate with respect to labour relations. The Labour Relations Board concluded that it had no jurisdiction to include in the proposed bargaining unit any employees of Hydro who worked on or in connection with any of the nuclear generating stations.

Hydro, supported by the Society and C.U.P.E. Local 1000, sought judicial review of that decision before the Divisional Court. At that stage the Attorneys General of Canada and of Ontario intervened. The Coalition withdrew from further participation in the proceedings. The Divisional Court disagreed with the decision of the Labour Relations Board and held that it had jurisdiction to deal with the application for certification insofar as it related to employees working on or in connection with the nuclear generating stations. It quashed the Labour Relations Board's decision and by an order in the nature of mandamus directed it to deal with the application for certification. It also made certain orders respecting costs.

I agree with the result reached by the Divisional Court upon the merits of the application. Since I have arrived at that result by a different route I will set out my own reasons. I do not agree with the disposition of costs made by the Divisional Court.

A few words about Hydro are appropriate at the outset. It is a provincial statutory corporation whose responsibility is to generate, transmit and distribute electricity throughout Ontario. At present it has 81 sites for generating electricity. Five of them are nuclear. The others are either thermal (coal or oil burning) or hydraulic. The five nuclear generating stations produce a little less than 50 percent of Hydro's total production of electricity. Once generated the electricity from each of the three different generating sources is distributed on a common grid throughout the province.

The electricity goes through approximately 230 transformer stations and approximately 770 distribution stations. Hydro sells some of the electricity directly to industrial and farm customers but sells most of it to 320 municipal public utility commissions which in turn distribute it to the ultimate consumer. The undertaking is gigantic and highly integrated. It integrates planning, administration, research, design, construction, production and generation, transmission, sale and distribution. Over 30,000 people are employed by Hydro in its undertaking. The successful management of such an organization requires control over its operation as a whole and over all of the constituent parts and segments making up that whole.

Hydro began operating its first nuclear generating station over 25 years ago. From that time to this the operation of its nuclear generating stations has been regulated by the Atomic Energy Control Board pursuant to the *Atomic Energy Control Act* R.S.C. 1985, c.A-16 and its predecessor statutes. Labour relations between Hydro and all of its employees, including those working on or in connection with its nuclear stations, have always been regulated by the Ontario *Labour Relations Act*. During argument it was common ground that throughout all of that time there has not been even one incident of conflict between the exercise of the federal authority's powers to regulate atomic energy and the exercise of the province's power to regulate labour relations. History demonstrates that in the case of Hydro the federal power to regulate atomic energy and the provincial power to regulate labour relations accommodate one another without problem.

That cannot fail to raise the question "why this litigation"? The Attorney General of Canada's answer to that question, and essentially it was also the answer of the Labour Relations Board, is that the Constitution of Canada is one of divided legislative authority and it is desirable that the divisions of that authority be observed even though such divisions may lead to inconvenience in individual cases.

The Labour Relations Board's decision in this case would cause Hydro serious practical difficulties if its labour relations with its employees had to be divided between two separate jurisdictions. Those difficulties are set out in the affidavit of Arvo Niitenberg, Hydro's Senior Vice-President Operations. They need not be repeated here because his testimony has neither been challenged nor has any evidence been led to the contrary. The effect of the Labour Relations Board's decision would be balkanize Hydro's labour relations with its employees. Before the Labour Relations Board, Hydro, C.U.P.E. Local 1000 and the Society observed "that it would make no labour relations sense to divide Hydro's labour relations with its employees into federal and provincial components". Nothing that I heard in argument and nothing that I saw in reading the Record in this case persuades me that the observation just quoted is an overstatement. Indeed, on the facts of this case it is, in my opinion, a correct observation. It is within this factual context that I propose to see whether the Constitution requires such an unsatisfactory result.

During argument the court benefited from a lengthy and scholarly debate about a number of issues of constitutional law. Counsel were in agreement, however, upon two fundamental matters. The first was that regulation of atomic energy falls within the federal sphere of legislative competence. There was debate about whether that jurisdiction derives from Parliament's power under s.91 of the *Constitution Act, 1867* to make laws for peace, order and good government, under power granted by s.92(10)(c) of that Act to declare "works" to be for the general advantage of Canada, or from a combination of both of those sources of power. Because of the view that I take of this case I do not think it is necessary for me to resolve that question.

The second matter about which all counsel were agreed was that, as a rule, labour relations in connection with a provincial undertaking falls within the provincial sphere of legislative competence.

I stress that the federal power to regulate atomic energy runs only to five of Hydro's 81 sites for

generating electricity. While the importance of those sites as sources of electricity should not be minimized they are not the major part of Hydro's integrated undertaking for the generation, transmission and distribution of electricity throughout Ontario.

Because Parliament has exclusive authority to regulate atomic energy it is not contested that it has power to regulate Hydro's five nuclear generating sites. The issue is whether, because of that authority it also has power, to the exclusion of the Province, to regulate Hydro's labour relations with its employees working on or in connection with those generating stations.

Without intending to downplay other parts of it, it is my understanding that the core of Ms. Levine's argument on behalf of the Attorney General of Canada was that the case is conclusively determined in the appellant's favour by a recent trilogy of cases in the Supreme Court of Canada. That trilogy comprises *Bell Canada v. Quebec (C.S.S.T.)*, [1988] 1 S.C.R. 749, *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868 and *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897.

The judgments in those three cases, all written by Beetz J., constitute a mammoth treatise upon the inter-relation of provincial statutes of general application with federal statutes regulating enterprises which come within Parliament's exclusive legislative sphere. There is a very important distinction between those cases and this one. The enterprises which were there under consideration were truly national in scope and were in broadest sense of the word federal undertakings. Bell Canada and Canadian National Railways are obviously so. Alltrans is a trucking business with exclusively inter-provincial and international operations. The very essence of their being is federal. On the contrary, Hydro is essentially a provincial undertaking. Only part of one of its many activities is within the federal sphere of legislative competence.

In *Bell Canada*, *supra*, Beetz J. formulated a number of propositions which set out some well-established principles of constitutional law. I wish to quote what seem to me to be salient parts of his propositions Two and Three. They appear at pp. 761-2:

Proposition Two

In principle, labour relations and working conditions fall within the exclusive jurisdiction of the provincial legislatures...

Proposition Three

Notwithstanding the rule stated in proposition two, Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions *when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects*, as is the case with labour relations and working conditions in the federal undertakings covered by ss. 91(29) and 92(10)a., b. and c. of the *Constitution Act, 1867*, that is undertakings such as Alltrans Express Ltd., Canadian National and Bell Canada. It follows that this primary and exclusive jurisdiction precludes the application to those undertakings of provincial statutes relating to labour relations and working conditions, since such matters are an essential part of the very management and operation of such undertakings, as with any commercial or industrial undertaking...

[Emphasis added.]

In Proposition Three Beetz J. held that provincial labour relations laws could not apply to those federal undertakings because labour relations was an essential part of their management and operation. However, I do not think, in saying that, he can be taken as having said that whenever some part of a provincial undertaking becomes subject to federal jurisdiction labour relations respecting that part of the provincial undertaking must be regulated federally. I have not been able to find that proposition stated explicitly or by implication in his judgment.

As I read it, the first part of Proposition Three explains when the exception will apply to the general rule that labour relations fall within the exclusive jurisdiction of the provinces. The exception applies when labour relations is "an integral part" of Parliament's primary and exclusive jurisdiction over some other class of subject. In the second part of the third proposition he explains the reason why the exception must apply. It is because labour relations are "an essential part" of the management of the federal undertaking. At p.825 he adopts the conclusion of Abbot J. in *Reference re Validity of Industrial Relations and Disputes Investigation Act* ("Stevedoring Case"), [1955] S.C.R. 529 (S.C.C.) that labour relations is a "vital part" of management. Obviously, since management is a vital part of the federal undertaking, the power to regulate the undertaking itself would be illusory in the absence of power to regulate that vital part of it. Put another way, power to regulate a federal undertaking requires the power to regulate those things that are integral, essential or vital to its management.

I think the principle to be drawn from the treatment of this subject in the trilogy is that a class of subject matter within the exclusive legislative competence of Parliament will be held to include labour relations if labour relations is an integral part, an essential part or a vital part, of the exercise of that jurisdiction. To apply that principle to this case I think that if labour relations is an integral, essential or vital part of the power to regulate atomic energy at Hydro's nuclear generating sites that the exception to the general rule of provincial power over labour relations would apply.

In this case the Atomic Energy Control Board acting under the regulations passed pursuant to the *Atomic Energy Control Act* regulates the five nuclear generating sites through licences which it issues to Hydro. I have been unable to find anything in that Act or in the licences issued pursuant to it which demonstrates that regulation of labour relations at these sites is integral, essential or vital to the regulation of atomic energy at them. On the contrary, as has been noted above, until now history has shown that there is no need to regulate labour relations in order to carry out effectively the federal power of controlling and regulating atomic energy at Hydro's nuclear generating sites. Thus, the federal power to control atomic energy at these sites need not import the power to regulate Hydro's labour relations with its employees working on or in connection with them. It seems to me therefore that the exception to the general rule is not applicable and that the general rule that labour relations fall within the exclusive jurisdiction of the provincial legislature applies.

I made earlier reference to what seems to me to be a fundamental distinction between the situation in the trilogy of cases and the situation in this case. Those undertakings were truly national while this is undoubtedly provincial. The general language used by Beetz J. in those cases must be considered in that context and care should be taken so that they are not taken out of context and given a meaning which was not intended. His finding that labour relations is a vital part of management can indicate, quite apart from the ordinary principle that labour relations is a provincial matter, that labour relations is an integral, essential and vital part of the management of a provincial undertaking and the provincial power to legislate respecting a provincial undertaking must include the corresponding legislative power to regulate its labour relations. Thus for the same reason that labour relations of a federal undertaking must be regulated federally I think that labour relations of a provincial undertaking should be regulated provincially.

One of the major issues that had to be determined in the trilogy was whether the provincial statutes in question were inconsistent with the federal legislation governing the federal undertaking. In *Bell Canada, supra*, Beetz J. made an extensive analysis of the provincial legislation which was there in question, the *Occupational Health & Safety Act* S.Q. 1979 c.63. He found that it dealt principally with working conditions, labour relations and management of an undertaking. It was specifically aimed at the management of the undertakings. That led to his conclusion at p.816 that

“the effect of applying the Act to a federal undertaking would be to allow a province to regulate the management of such an undertaking, a matter which is within exclusive federal jurisdiction”. There was, therefore, a serious conflict between the provincial legislation and a subject exclusively within the ambit of federal legislative jurisdiction. It was that encroachment caused by the conflict that led to the decision that the provincial law could not apply to an undertaking exclusively subject to the legislative competence of Parliament. The rule is that in such a case the federal undertaking is excluded from the application of the provincial law. But it is important to note that the rule is not an absolute one. The rule applies, according to Beetz J. at p. 833, when the application of a provincial law “would bear on the specifically federal nature of the jurisdiction” to which the federal undertaking is subject.

In my opinion it follows as a necessary corollary that if the provincial law does not bear on the specifically federal nature of the federal exercise of power the rule excluding application of the provincial law does not apply. In this case the provincial law regulating Hydro’s labour relations with its employees does not conflict in its terms or in its practical application with the federal law regulating atomic energy at Hydro’s five nuclear generating stations. I am of the opinion, therefore, that the provincial *Labour Relations Act* does not bear on the federal power to regulate that nuclear generating sites and accordingly it is not excluded from application to those sites.

The Supreme Court of Canada has recently stated that the doctrine of federal paramountcy which renders inoperative provincial legislation which is inconsistent with a federal statute does not apply when there is no conflict between the two statutes. See *National Battlefields Commission v. La Commission de Transport de la Communauté Urbaine de Québec* (Oct. 4, 1990) at pp.3-4. Since there is no conflict between the statutes in this case that doctrine is inapplicable.

A great part of the jurisprudence on the subject of constitutional law is made up of cases deciding whether a federal law or a provincial law should prevail where there is conflict between them. This was foreseen as long ago as 1881 when the Judicial Committee of the Privy Council gave its decision in *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96. I think its oft quoted admonition at p.109 is as valid today as it was then:

...It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute, than is necessary for the decision of the particular question in hand.

In the light of that I would be disinclined, unless it were necessary to do so, to interpret the federal and provincial laws with which the court is here concerned in a fashion that would find them in conflict when they have been applied without conflict for over 25 years. In addition, I doubt that it would be appropriate to take on the task of attempting to determine in advance which law should prevail in the event that a conflict might emerge between them in the years to come.

In this case, in my opinion, it is possible to arrive at a reasonable and practical construction of the *Atomic Energy Act* and of the Ontario *Labour Relations Act* so as to reconcile their respective powers and to give effect to them all. Each of them can do its job without bearing upon the other’s responsibility. So long as that can be done, as it is being done, I see no need for the court to determine which of the powers would prevail should they ever come into conflict.

There have been cases in recent years where the courts have been able to arrive at a reasonable

and practical construction of federal and provincial powers so that they could be reconciled with one another in order to give effect to them both. The first of these cases to which I wish to refer is *Hamilton Harbour Commissioners v. The City of Hamilton* (1978), 21 O.R. (2d) 459; aff'd. C.A. at p.491. In that case the Hamilton Harbour Commissioners sought to have certain of the City's land use control by-laws declared *ultra vires* because they purported to regulate the use and development of private waterfront land within the limits of the Hamilton harbour. Griffiths J. (as he then was) concluded that jurisdiction over harbours fell within the legislative competence of Parliament. He also found that the City had power to control the use of land under statutes enacted pursuant to powers falling within the legislative competence of the province. Although he recognized that there was a potential for conflict between the exercise of the provincial powers and the exercise of the federal powers he concluded that "there was no present conflict" between them. Because of the absence of conflict he refused to declare the by-laws *ultra vires*. This court upheld that decision.

In *Bavark Holdings v. Toronto Harbour Commissioners* (1987), 34 M.P.L.R. 278 it was argued that s.29 of *The Planning Act* R.S.O. 1980, c.379, a valid piece of provincial legislation, was in conflict with the *Toronto Harbour Commissioners Act* S.C. 1911, c.26, a valid piece of federal legislation, and was therefore inoperative insofar as it related to the Toronto Harbour Commission. R.E. Holland J. compared the two statutes. After doing so he concluded that the power granted by the federal Act to the Harbour Commission to sell land could co-exist with the provisions of s.29 of *The Planning Act* which required the consent of a Committee of Adjustments in some circumstances. Because he found that the two Acts could co-exist he held that there was no conflict between them.

The third of those cases to which I wish to refer is the judgment of the British Columbia Court of Appeal in *R. in Right of B.C., etc. v. Van Gool* (1987), 12 B.C.L.R. (2d) 361. In that case the accused operated an ultralight aircraft landing field in contravention of a municipal zoning by-law which prohibited the use of the land for that purpose. A prosecution under the by-law was dismissed because the trial judge held that the by-law intruded upon the federal power to regulate aeronautics. His judgment was upheld upon an appeal to a judge in chambers. Wallace J.A., giving the judgment of the Court of Appeal, distinguished the facts of the case from those in *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292. He said at pp.367-68:

As previously noted, Surrey by-law 5942 is directed to land use zoning within the municipality. No licensed air service or airport is involved; no matter of national concern is in question (nor indeed is there any suggestion that there ever will be). The only use involved is that of a private owner for his own private purposes, a purely local concern over which the federal government has shown no interest in regulating.

Accordingly, I consider the factual circumstances in the instant case to be markedly different from those present in the *Johannesson* case, which reflected the concern that the federal government shall regulate aeronautics in the national interest and that municipal by-laws not erode the federal authority in this area.

His conclusion found at pp.371-72 is as follows:

It is proper to assume that, since the municipality was well aware of the many decisions confirming the exclusive jurisdiction over aeronautics of the federal Parliament, it did not intend, by the general by-law, to intrude upon or affect the regulatory power of the minister under the Aeronautics Act. This view is supported by the general nature of the zoning by-law and the reference in the by-law to the use of the land for airports being confined to "private airports" which are used for "private purposes only". Any other interpretation would presume that the provincial legislature and the municipal council intended to exercise a regulating power which would render the authority of the minister under the Aeronautics Act nugatory. Such an interpretation would be contrary to that rule of construction referred to in the *McKay* case, supra, that "if an

enactment ... is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly”.

I am of the opinion that Surrey Zoning By-law, 1979, No. 5942 on its proper construction does not purport to apply to, or otherwise affect, the regulatory power of the minister under the Aeronautics Act or to intrude upon the exclusive jurisdiction of the federal government over the matter of aeronautics. Rather, it is a valid exercise of the jurisdiction of the province and the municipality confined to the regulation of the use of land within the declared zone.

What I think these cases show is that there is a tendency, and one that seems to me to be desirable, on the part of courts to attempt to reconcile provincial and federal powers so that both can be given effect to unless irreconcilable conflicts make that impossible.

In this case the licence issued by the Atomic Energy Control Board contains some provisions relating to the staffing of certain parts of the nuclear generating stations which require that persons with certain qualifications be in certain positions and that a certain number of personnel be located at particular areas at certain times. It was argued that this shows that the federal authority has a vital interest in Hydro's labour relations with its employees. I cannot accept that contention. In the Record there is not one instance where those requirements have led to any conflict with Hydro's labour relations with its employees. Nor is there one instance where Hydro's labour relations with its employees has been in conflict with the Atomic Energy Control Board's staffing requirements.

The federal exercise of its power to control atomic energy at those sites is not in conflict in any way with Hydro's labour relations with its employees. In my view there is simply no conflict between the exercise of the respective legislative powers. Thus there is no conflict which would justify excluding the application of the Ontario *Labour Relations Act* to any of the five nuclear generating stations.

Much argument concerned the effect of the power contained in s.92A of the *Constitution Act, 1867* if there were a conflict between the federal power to control atomic energy and the provincial power to regulate labour relations. Because I am of the view that there is no conflict which would exclude the provincial labour relations regime from the nuclear generating sites I consider it neither necessary nor desirable to make any comment upon the effect that s.92A would have if there were a conflict between the two legislative powers.

For these reasons I am of the opinion that the Labour Relations Board was wrong when it held that it did not have jurisdiction to deal with the employees of Hydro who worked on or in connection with the nuclear generating stations. I would dismiss the appeal from the decision of the Divisional Court directing the Labour Relations Board to proceed with the certification application.

As part of its order the Divisional Court ordered costs of all parties including Hydro and the Attorney General of Ontario to be paid by the Attorney General of Canada. It was conceded by the Attorney General of Ontario and by Hydro that it is not the usual practice to order costs against an Attorney General who intervenes in a constitutional case. It should not be a general rule that an Attorney General who intervenes on a constitutional issue raised by someone else should bear responsibility for the costs of the other parties to the litigation. No reason has been shown why there should have been a departure from the usual practice in this case. Moreover the was this case developed militates against the awarding of costs against the Attorney General of Canada. The Coalition, which raised the constitutional issue, dropped out of the proceedings before they reached the Divisional Court. Had the Attorney General of Canada not intervened the Divisional Court would not have had the assistance of someone to present the federal side of the constitutional issue. It is my opinion that the award of costs was made contrary to the usual practice and in the absence of proof of any reason to depart from that usual practice.

I would therefore allow the appeal of the Attorney General of Canada against the disposition of costs in the Divisional Court and strike out paragraph e) of the order of the Divisional Court. In other respects I would affirm that order.

I would make no order as to costs of this appeal.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1990

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3307-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Bradsil Ltd., Bradsil Leasehold Ltd., Bradsil (1980) Ltd., Bradsil (1967) Ltd. (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (18 employees in unit)

1247-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. M. Pickard Construction Co. Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the County of Grey, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (56 employees in unit)

1249-89-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. M. Pickard Construction Co. Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2182-89-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Repla Ltd. (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Durham, save and except forepersons, persons above the rank of forepersons, students employed during the school vacation period, persons regularly employed for not more than 24 hours per week, office and sales staff and security guards" (22 employees in unit) (*Having regard to the agreement of the parties*)

0460-90-R: United Steelworkers of America (Applicant) v. Drillex International of Canada Inc. (Respondent) v. Ron Mattin, Group of Employees (Objectors)

Unit: "all employees of the respondent in the Regional Municipality of Sudbury, save and except Assistant Foreman, persons above the rank of Assistant Foreman, office, clerical, technical and sales staff" (59 employees in unit) (*Having regard to the agreement of the parties*)

1062-90-R: IWA-Canada, Local 1-2995 (Applicant) v. Chapleau Forest Products Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Town of Chapleau, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period” (109 employees in unit) (*Having regard to the agreement of the parties*)

1373-90-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Waterloo Region Roman Catholic Separate School Board (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1458-90-R: Canadian Union of Public Employees (Applicant) v. The Oshawa & District Association for Community Living (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Durham, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and persons for whom any trade union held bargaining rights as of August 30, 1990” (24 employees in unit) (*Having regard to the agreement of the parties*)

1732-90-R: United Brotherhood of Carpenters & Joiners of America, Drywall, Acoustic, Lathing & Insulation, Local 675 (Applicant) v. 750574 Ontario Ltd. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1753-90-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Strathroy Concrete Forming (1988) Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

1787-90-R: Service Employees International Union, Local 204 (Applicant) v. Saint Thomas’ Houses (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

1893-90-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Northway Industries, Division of 881639 Ontario Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1906-90-R: Ontario Public Service Employees Union (Applicant) v. Leeds/Grenville Phased Housing Program Inc. (Respondent)

Unit: “all employees of the respondent in the County of Leeds/Grenville, save and except supervisors, persons above the rank of supervisor” (11 employees in unit) (*Having regard to the agreement of the parties*)

1930-90-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Lisbon Paving Co. Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, and the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (8 employees in unit)

1931-90-R: Service Employees’ International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. People in Transition (Alliston) Inc. (Respondent)

Unit #1: “all employees of the respondent in Alliston, save and except supervisors, persons above the rank of supervisor, the office manager/bookkeeper, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: all employees of the respondent in Alliston regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and the office manager/bookkeeper” (11 employees in unit) (*Having regard to the agreement of the parties*)

1955-90-R: Hospitality, Commercial & Service Employees Union, Local 73 of the Hotel Employees & Restaurant Employees International Union (Applicant) v. Ronscott Inc. c.o.b. as Shoreline Motor Hotel (Respondent)

Unit: “all employees of the respondent in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor and the accountants/bookkeeper” (38 employees in unit) (*Having regard to the agreement of the parties*)

1970-90-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. 536249 Ontario Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Oshawa, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (36 employees in unit) (*Having regard to the agreement of the parties*)

1978-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Furtney Funeral Homes Ltd. (Respondent)

Unit: “all employees of the respondent in the City of London, save and except Managing Directors, persons above the rank of Managing Director and employees regularly employed for not more than 24 hours per week” (6 employees in unit) (*Having regard to the agreement of the parties*)

2025-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Crosby Aluminum Inc. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institu-

tional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2026-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Fenmar Aluminum Inc. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2041-90-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. BlueLine Wall-coverings & Decorating (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2066-90-R: International Brotherhood of Painters & Allied Trades (Applicant) v. Begg & Daigle Store & Office Interiors (Respondent)

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of the respondent in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

2067-90-R: Canadian Union of Public Employees (Applicant) v. Memorial Hospital - Bowmanville (Respondent)

Unit: “all office and clerical employees of the respondent in Bowmanville, save and except supervisors, persons above the rank of supervisor, and students employed on a cooperative training program” (30 employees in unit) (*Having regard to the agreement of the parties*)

2077-90-R: Service Employees’ International Union, Local 204, affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Speciality Care Inc. c.o.b. Cedarvale Lodge (Respondent)

Unit #1: “all employees of the respondent in Keswick, save and except supervisors, persons above the rank of supervisor, registered, graduate and undergraduate nurses, professional medical staff, paramedical employees, Activation Director, Recreation Co-ordinator, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (24 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in Keswick, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered, graduate and undergraduate nurses, professional medical staff, paramedical employees, Activation Director, Recreation Co-ordinator, and office and clerical staff” (41 employees in unit) (*Having regard to the agreement of the parties*)

2090-90-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. Mainway Industrial Installations (Respondent)

Unit: “all boilermakers and boilermakers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all boilermakers and boilermakers’ apprentices in the employ of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

2105-90-R: United Steelworkers of America (Applicant) v. 682901 Ontario Ltd. (Respondent)

Unit: “all employees of the respondent in its Great Northern Retirement Home Division in the City of Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor” (37 employees in unit) (*Having regard to the agreement of the parties*)

2115-90-R: International Ladies’ Garment Workers’ Union (Applicant) v. Rai Sportswear Ltd. (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, designers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (8 employees in unit) (*Having regard to the agreement of the parties*)

2120-90-R: Canadian Union of Public Employees (Applicant) v. Stratford General Hospital (Respondent)

Unit: “all office and clerical employees of the respondent at Stratford, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, accountant, three secretaries to the Executive Offices, one secretary to the Personnel Office and two secretaries to the Nursing Office, and persons for whom any trade union held bargaining rights as of November 7, 1990” (40 employees in unit) (*Having regard to the agreement of the parties*)

2124-90-R: United Steelworkers of America (Applicant) v. Roy Talevi General Welding Inc. (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Sudbury, save and except forepersons, persons above the rank of foreperson, office and clerical staff, and employees in bargaining units for which any trade union held bargaining rights as of November 13, 1990” (7 employees in unit) (*Having regard to the agreement of the parties*)

2167-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Tryverse Products Ltd., c.o.b. as Lilo Products (Respondent)

Unit: “all employees of the respondent in Hamilton, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (13 employees in unit) (*Having regard to the agreement of the parties*)

2173-90-R: Energy & Chemical Workers Union (Applicant) v. Matheson Gas Products Canada Inc. (Respondent)

Unit: “all employees of the respondent in the City of Whitby, save and except foremen, persons above the rank of foreman, office and sales staff” (17 employees in unit) (*Having regard to the agreement of the parties*)

2179-90-R: Christian Labour Association of Canada (Applicant) v. 714415 Ontario Ltd. (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent at its nursing home(s) at Fort Erie, save and except the director of nursing and persons above the rank of director of nursing” (4 employees in unit) (*Having regard to the agreement of the parties*)

2182-90-R: Hotel, Motel & Restaurant Employees Union, Local 442 (Applicant) v. 706969 Ontario Ltd. o.a. Golden Griddle Pancake House (Respondent)

Unit #1: “all employees of the respondent in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (12 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the City of St. Catharines regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor” (31 employees in unit) (*Having regard to the agreement of the parties*)

2195-90-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Palisade Homes Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

2196-90-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Upper Canada Lakes Inc. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2207-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. S.K.S. Mechanical Corporation (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2214-90-R: Retail, Wholesale & Department Store Union (Applicant) v. Mc Pharmacy Ltd. (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Sudbury, save and except pharmacists, persons above the rank of pharmacist, and persons regularly employed for not more than 24 hours per week” (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2221-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Durham Region Cheshire Homes Inc. (Respondent)

Unit: “all employees of the respondent in the Town of Whitby, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (10 employees in unit) (*Having regard to the agreement of the parties*)

2222-90-R: International Union of Bricklayers & Allied Craftsmen, Local 2, Ontario (Applicant) v. Allied Architectural Systems Ltd. (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in

the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (20 employees in unit)

2228-90-R: International Leather Goods, Plastics & Novelty Workers’ International Union, Local 8 (Applicant) v. Root Chemical Company Inc. (Respondent)

Unit: “all employees of the respondent in the Town of Vaughan, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (22 employees in unit) (*Having regard to the agreement of the parties*)

2241-90-R: Hotel Employees, Restaurant Employees Union, Local 75 (Applicant) v. Polygrand Developments Inc. c.o.b. Essex Park Hotel (Respondent) v. Tara Mistry (Objector)

Unit: “all employees of the respondent at Essex Park Hotel, 300 Jarvis Street, Toronto, save and except supervisors, persons above the rank of supervisor, office and accounting staff, security staff, and students employed during the school vacation period” (40 employees in unit) (*Having regard to the agreement of the parties*)

2261-90-R: Service Employees’ International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. National Council of Jewish Women, Toronto Section Charitable Foundation - Bathurst/Prince Charles Outreach and Attendant Care Programs (Respondent)

Unit: “all employees of the respondent Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (20 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2296-90-R: Service Employees’ International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Riverdale Immigrant Women’s Centre (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except Executive Director, persons above the rank of Executive Director and office and clerical staff” (8 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1745-90-R: United Steelworkers of America (Applicant) v. Eurocollection Canada Ltd. (Respondent) v. Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Intervener)

Unit: “all employees of the respondent in the City of Brampton, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (55 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	55
Number of persons who cast ballots	43
Number of ballots marked in favour of applicant	38
Number of ballots marked in favour of intervener	5

1916-90-R: Ontario Public School Teachers Federation (Applicant) v. The Nipissing Board of Education (Respondent)

Unit: “all occasional teachers employed by the respondent in its elementary panel in the District of Nipissing,

save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (67 employees in unit)

Number of names of persons on revised voters' list	70
Number of persons who cast ballots	38
Number of ballots marked in favour of applicant	37
Number of ballots marked against applicant	1

2333-90-R: Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses - York Branch (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the Victorian Order of Nurses - York Branch, Newmarket, save and except supervisors, persons above the rank of supervisor" (65 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	65
Number of persons who cast ballots	61
Number of ballots marked in favour of applicant	32
Number of ballots marked against applicant	29

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1879-90-R: Independent Canadian Transit Union (Applicant) v. The Westin Hotel (Respondent)

Unit: "all employees of the respondent employed as stationary engineers and persons primarily engaged as their helpers in the City of Ottawa, save and except chief engineer, persons above the rank of chief engineer, and students employed pursuant to a course of education registered with a school, college or university" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	0

Applications for Certification Dismissed Without Vote

2830-88-R: Canadian Guards Association (Applicant) v. Universal Investigation Service Inc. (Respondent) v. David Birken (Intervener) (221 employees in unit)

3095-88-R: United Steelworkers of America (Applicant) v. Adanac Investigation & Security Ltd. (Respondent) (72 employees in unit)

0028-89-R: United Steelworkers of America (Applicant) v. Canadian Protection Services Ltd. (Respondent) v. Vincent J. Lewis (Intervener) (103 employees in unit)

0294-89-R: United Steelworkers of America (Applicant) v. Burns International Security Services Ltd. (Respondent) (145 employees in unit)

0295-89-R: United Steelworkers of America (Applicant) v. Burns International Security Services Ltd. (Respondent) (158 employees in unit)

0296-89-R: United Steelworkers of America (Applicant) v. Burns International Security Services Ltd. (Respondent) (43 employees in unit)

0935-89-R: United Steelworkers of America (Applicant) v. Harold Security Services Ltd. (Respondent) (11 employees in unit)

0954-89-R: United Steelworkers of America (Applicant) v. Paragon Protection Ltd. (Respondent) (10 employees in unit)

1062-89-R: United Steelworkers of America (Applicant) v. Burns International Security Services Ltd. (Respondent) (58 employees in unit)

1174-89-R: United Steelworkers of America (Applicant) v. 556055 Ontario Inc. o/a Hamilton Wentworth Protection Services Ltd. (Respondent) (138 employees in unit)

1374-89-R: United Steelworkers of America (Applicant) v. 445733 Ontario Ltd., c.o.b. as McLean Security (Respondent) (41 employees in unit)

1548-89-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Ottawa Board of Education (Respondent) (1018 employees in unit)

1592-89-R: United Steelworkers of America (Applicant) v. Trojan Security & Investigation Services Ltd. (Respondent) v. Employee (Objector) (12 employees in unit)

2112-89-R: United Steelworkers of America (Applicant) v. Burns International Security Services Ltd. (Respondent) (78 employees in unit)

0181-90-R: Hotel Employees & Restaurant Employees Union, Local 604, A.F. of L., C.I.O., C.L.C. (Applicant) v. 599207 Ontario Inc. (Respondent) (48 employees in unit)

2027-90-R: International Union United Plant Guard Workers of America, Local 1962 (Applicant) v. Centenary Hospital Association (Respondent) v. Group of Employees (Objectors) (8 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3203-89-R: Labourers' International Union of North America, Local 1089 (Applicant) v. 093378 Ontario Inc. (Respondent) v. Operative Plasterers' & Cement Masons' International Association of the United States & Canada (Intervener #1) v. Local 598 of the Operative Plasterers' & Cement Masons' International Association of the United States & Canada (Intervener #2) v. The Provincial Conference of Ontario of the Operative Plasterers' & Cement Masons' International Association of the United States & Canada (Intervener #3)

Unit: "all working foremen, journeymen and apprentice cement masons and waterproofers engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	1

1743-90-R: Amalgamated Clothing & Textile Workers Union (Applicant) v. Angelica Uniforms of Canada Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, design and quality control staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (165 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons on voters' list at start of vote	165
Persons removed from voters' list on consent of parties	2
Number of names of persons on revised voters' list	163
Number of persons who cast ballots	150
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	148

Number of segregated ballots cast by persons whose names appear on voters' list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	69
Number of ballots marked against applicant	75
Ballots segregated and not counted	1

1752-90-R: Teamsters Chauffeurs, Warehousemen & Helpers Union, Local No. 880 (Applicant) v. A & H Bolt & Nut Company Ltd. c.o.b. as the Fastener Centre (Respondent)

Unit: "all office employees of the respondent at Windsor, save and except supervisors, persons above the rank of supervisor, outside sales, professional staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and employees in any bargaining units for which any trade union holds bargaining rights as of October 3, 1990" (37 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	32
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	16

1791-90-R: United Steelworkers of America (Applicant) v. The Mississauga Hospital (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except supervisors, co-ordinators and assistant foremen, persons above the rank of supervisor, co-ordinators and assistant foremen, professional medical staff, graduate, undergraduate and registered nurses, paramedical staff, office and clerical staff, security guards, chief engineer, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of October 9, 1990" (564 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	564
Number of persons who cast ballots	420
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	203
Number of ballots marked against applicant	216

1898-90-R: Communications & Electrical Workers of Canada (Applicant) v. Computer Assembly Systems Ltd. c.o.b. as Compas (Respondent)

Unit: "all employees of the respondent in Brockville, save and except supervisors, persons above the rank of supervisor, office, clerical and administrative staff, engineering staff, customer service representatives, outside sales staff and purchasing staff" (428 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	453
Number of persons who cast ballots	409
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	375
Number of segregated ballots cast by persons whose names appear on voters' list	34
Number of spoiled ballots	10
Number of ballots marked in favour of applicant	161
Number of ballots marked against applicant	204
Ballots segregated and not counted	34

1986-90-R: United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO-CLC (Applicant) v. C.N. Weber Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Kitchener, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours

per week and students employed during the school vacation period” (employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	68
Number of persons who cast ballots	65
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	44

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2174-87-R: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Regional Sewer & Watermain Ltd. (Respondent)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	10
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	8

0080-90-R; 0081-90-R: United Steelworkers of America (Applicant) v. Wefab Ltd. and Wejay Machine Products Company Ltd. (Respondents) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Township of Kingston, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff” (31 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	31
Number of persons who cast ballots	28
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	13

1845-90-R: Communications & Electrical Workers of Canada (Applicant) v. Optotek Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except managers, persons above the rank of manager” (21 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	21
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	11

1876-90-R: International Union United Plant Guard Workers of America, Local 1962 (Applicant) v. Victoria Hospital Corporation (Respondent) v. Group of Employees (Objectors)

Unit: “all security guards employed by the respondent in the City of London, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (21 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	21
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	1

Applications for Certification Withdrawn

1729-90-R; 1959-90-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. The Consumers Millwork Co. Ltd. and Stucor Construction Ltd. (Respondents)

2013-90-R; 2029-90-R; 2030-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Al White Construction Co. Ltd. (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 247 (Intervener) v. Group of Employees (Objectors)

2142-90-R: Service Employees' International Union, Local 204, Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Ruse Travel Agency Ltd. D.B.A. Woodside Travel Services (Respondent) v. Group of Employees (Objectors)

2145-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Wentworth-Lincoln Excavating, Div. of Wentworth-Lincoln Landscaping Ltd. (Respondent)

2357-90-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Carshan Construction Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

2136-90-FC: Service Employees' International Union, Local 204, Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Lanwell Property Management Ltd. c.o.b. as St. Charles Village (Respondent) (*Withdrawn*)

2164-90-FC: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Kraus Carpet Mills Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1368-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Delta Electric Eastern Ltd., Delta Electrical & Mechanical Inc., Delta Electrical & Mechanical Ltd. and Delta Electric Ltd. (Respondents) (*Granted*)

1629-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 527 (Applicant) v. D & S Plumbing & Heating Ltd. and Active Mechanical Contractors (Respondents) (*Withdrawn*)

1698-90-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Domicile Construction Corp. and Doran Construction Ltd. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

1368-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Delta Electric Eastern Ltd., Delta Electrical & Mechanical Inc., Delta Electrical & Mechanical Ltd. and Delta Electric Ltd. (Respondents) (*Granted*)

1628-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 527 (Applicant) v. K & S Plumbing & Heating Ltd. and Active Mechanical Contractors (Respondents) (*Withdrawn*)

1698-90-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Domicile Construction Corp. and Doran Construction Ltd. (Respondents) (*Withdrawn*)

CROWN TRANSFER ACT

2470-89-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Centennial Centre of Science & Technology (Ontario Science Centre) and Brampton Building Services Ltd. (Respondents) (*Granted*)

2472-89-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Agriculture & Food (Alfred College of Agriculture & Food Technology) and Gilles Carriere (Respondents) (*Granted*)

2473-89-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Agriculture & Food (Alfred College of Agriculture & Food Technology) and M.C.S. Landscaping (Mario Seguin) (Respondents) (*Granted*)

2475-89-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Agriculture & Food (Alfred College of Agriculture & Food Technology) and Domco Food Services Ltd. (Respondents) (*Granted*)

0220-90-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Centennial Centre of Science & Technology (Ontario Science Centre) and Brampton Building Services Ltd. (Respondents) (*Granted*)

2146-90-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Agriculture & Food (Alfred College of Agriculture & Food Technology) and Gilles Carriere (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0355-90-R: Nancy Woodford (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. 759505 Ontario Inc. c.o.b. as Mount Pleasant I.G.A. (Intervener) (35 employees in unit) (*Dismissed*)

0601-90-R: Ian Murphy, on his own behalf and on behalf of a group of employees of Code Felt Ltd. (Applicant) v. Canadian Paperworkers Union and its Local 333-23 C.L.C. (Respondent) v. Code Felt Ltd. (Intervener)

Unit: "all employees at Code Felt Limited in Perth, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period" (14 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	9

1249-90-R: Scott McCutcheon (Applicant) v. United Food & Commercial Workers International Union, Local 1000A (Respondent) v. Fisher Scientific Ltd. (Intervener)

Unit: "all employees of the respondent of Fisher Scientific in the Town of Whitby, save and except supervisors, persons above the rank of supervisor, office, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (24 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	23
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	16

1322-90-R: Leonard Woodcox (Applicant) v. United Steelworkers of America (Respondent) v. Wilberforce Planing Mill & Wood Components (Intervener)

Unit: "all employees of Wilberforce Planing Mill and Wood Components, in Monmouth Township, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (9 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	6

1734-90-R: Frank Falcioni (Applicant) v. Warehouseman Transportation & General Workers Union Local 715 of the Retail, Wholesale & Department Store Union, AFL -CIO - CLC (Respondent) v. The Hostess Frito-Lay Company (Intervener)

Unit: "all employees of the Hostess Frito-Lay company at Sudbury, save and except supervisors, persons above the rank of supervisor, office staff and students employed during the school vacation period" (14 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	9

1867-90-R: Tom Blyeth, Marco Olivieri, George Petropoulakis (Applicants) v. Retail, Wholesale & Department Store Union (Respondent) v. Joseph Santagapita (Intervener) (*Withdrawn*)

2023-90-R: United Brotherhood of Carpenters & Joiners of America, Local 446 (Applicant) v. Christian Labour Association of Canada (Respondent) (*Withdrawn*)

2063-90-R: Steve Cochrane (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Respondent) v. Western Inventory Services Ltd. (Intervener) (*Withdrawn*)

2123-90-R: Employees of Custom Concrete Northern Ltd. (Applicant) v. United Steelworkers of America (Respondent) v. Custom Concrete Northern (Intervener) (12 employees in unit) (*Granted*)

2133-90-R: Hugh Harvey (Applicant) v. District Lodge 717, International Association of Machinists & Aerospace Workers (Respondent) v. Trailerent Manufacturing Ltd./Caravan Trailer Rental Co. Ltd. (Intervener) (6 employees in unit) (*Granted*)

2198-90-R: Bill Perks (Applicant) v. International Brotherhood of Electrical Workers, Local 804 (Respondent) (6 employees in unit) (*Dismissed*)

2201-90-R: Wesley Hodgkins (Applicant) v. United Food & Commercial Workers International Union (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

2444-90-U: Ellis-Don Ltd. (Applicant) v. Sheet Metal Workers, Local 30 and Fred Thompson (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2849-88-U: International Union of Operating Engineers, Local 793 (Complainant) v. Graham Bros. Construction Ltd. (Respondent) (*Withdrawn*)

0341-89-U; 0342-89-U: Erik Hansink (Complainant) v. Garry Murphy, George Knott, John Graham, C.A.W., Local 222 (Respondent) (*Dismissed*)

1191-89-U: Antoine A. Plennevaux (Complainant) v. Labourers' International Union of North America, Local 1036 (Respondent) (*Dismissed*)

1563-89-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and Jill Bettes (Complainants) v. Boeing Canada/DeHavilland Division (Respondent) (*Dismissed*)

2013-89-U: Peggy Joe Gasiorek (Complainant) v. Canadian Union of Public Employees, Local 1263 and Regional Municipality of Niagara (Respondents) (*Dismissed*)

2105-89-U: Ontario Public Service Employees Union (Complainant) v. Sudbury Youth Services Inc. (Respondent) (*Dismissed*)

2148-89-U: United Brotherhood of Carpenters & Joiners of America (Complainant) v. Repla Ltd. (Respondent) (*Granted*)

2353-89-U: Toronto Transit Commission (Complainant) v. Amalgamated Transit Union, Local 113 (Respondent) v. William L. Franco et al. (Interveners) (*Dismissed*)

3107-89-U: Everette Chapelle (Complainant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission Wheel Trans Department (Intervener) (*Dismissed*)

0109-90-U: Kiflay Yemaneab (Complainant) v. St. Joseph Health Centre (Respondent) v. Canadian Union of Public Employees, Local 1144 (Intervener) (*Dismissed*)

1326-90-U: United Steelworkers of America (Complainant) v. Obus Forme Ltd. (Respondent) (*Granted*)

1547-90-U: Christopher Topple (Complainant) v. The International Union United Plant Guard Workers of America, Local 1962 (Respondent) v. General Motors of Canada (Intervener) (*Granted*)

1588-90-U: Canadian Paperworkers Union, Local 1150 (Complainant) v. Paperboard Industries Corporation and Select Corrugating Services Division (Respondents) (*Withdrawn*)

1601-90-U: Glenn Torraville (Complainant) v. Teamsters Union, Local 230 (Respondent) (*Withdrawn*)

1602-90-U: Curtis B. Torraville (Complainant) v. Teamsters Union, Local 230 (Respondent) (*Withdrawn*)

1609-90-U: Vijay Mehta (Complainant) v. Sunworthy Wallcoverings A Division of the Borden Company, Ltd. and Canadian Paperworkers Union, C.L.C. and its Local 304 (Respondents) (*Dismissed*)

1631-90-U: Raymond Gordon Loeppky (Complainant) v. Algoma Steel Corporation and Dofasco Inc. (Respondent) (*Withdrawn*)

1697-90-U: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Complainant) v. Frank Gigliotti Contracting and North South Construction Ltd. (Respondent) (*Withdrawn*)

1707-90-U: United Steelworkers of America (Complainant) v. H & H Manufacturing Ltd. (Respondent) (*Dismissed*)

1718-90-U: Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation No. 43 (Respondent) (*Withdrawn*)

1941-90-U: Ontario Public Service Employees Union (Complainant) v. John Howard Society of Metropolitan Toronto (Respondent) (*Withdrawn*)

1946-90-U: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. 688996 Ontario Inc. o/a Markus Construction (Pembroke) (Respondent) (*Dismissed*)

2058-90-U: Hospitality, Commercial & Service Employees Union, Local 73 Hotel Employees Restaurant Employees International Union (Complainant) v. Quetico Centre (Respondent) (*Withdrawn*)

2068-90-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. White Store Equipment Service (Respondent) (*Withdrawn*)

2121-90-U: Labourers' International Union of North America, Local 1050 (Complainant) v. Strathroy Concrete Forming (1988) Inc. (Respondent) (*Dismissed*)

2206-90-U: Labourers' International Union of North America, Local 183 (Complainant) v. Lisbon Paving Co. Ltd. (Respondent) (*Granted*)

2316-90-U: Antonio Custoza (Complainant) v. The City of Oshawa (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTIONS

1177-90-M; 1183-90-M: Luci M. Petronella Dickerson and Michelle Corriveau (Applicants) v. Association of Allied Health Professionals (Respondent Trade Union) v. Renfrew County & District Health Unit (Respondent Employer) (*Dismissed*)

JURISDICTIONAL DISPUTES

0579-89-JD: G. Torno Engineering Inc. (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 38 and Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 837 (Respondents) (*Granted*)

1683-89-JD: E. H. Price Ltd. (Complainant) v. Sheet Metal Workers' International Association, Local 47, Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' Conference (Respondents) v. United Steelworkers of America and United Steelworkers of America, Local 8990, Ontario Sheet Metal & Air Handling Group and Megatech Contracting Ltd. (Interveners) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1682-89-M: E. H. Price Ltd. (Complainant) v. Sheet Metal Workers' International Association, Local 47, Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' Conference (Respondents) v. United Steelworkers of America and United Steelworkers of America, Local 8990 (Interveners) (*Dismissed*)

2421-89-M: Canadian Union of Public Employees, Local 138 (Applicant) v. Sudbury Hydro (Respondent) (*Withdrawn*)

0410-90-M: I.B.E.W., Local 636 (Applicant) v. Mississauga Hydro Electric Commission (Respondent) (*Withdrawn*)

0423-90-M: Christie Park Nursing Homes Ltd. (Applicant) v. S.E.I.U. (Respondent) (*Withdrawn*)

0488-90-M: Acme Building & Construction Ltd. (Applicant) v. Labourers' International Union of North

America, Local 183 and United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondents) (*Dismissed*)

1208-90-M: St. Catharines General Hospital (Applicant) v. Ontario Nurses' Association (Respondent) (*Dismissed*)

1568-90-M: St. Catharines Civic Employees' Credit Union Ltd. (Applicant) v. Office & Professional Employees International Union, Local 343 (Respondent) (*Withdrawn*)

1954-90-M: Energy & Chemical Workers Union (Applicant) v. Serviplast Inc. (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1761-88-OH: Jill Bettes (Complainant) v. Boeing Canada/DeHavilland Division (Respondent) (*Dismissed*)

1796-88-OH: Bradley Mark Ballanger (Complainant) v. McDonnell Douglas Canada Ltd. (Respondent) (*Dismissed*)

2135-89-OH: Domenico Paolo (Complainant) v. Crothers Ltd. (Respondent) (*Granted*)

1311-90-OH: James Allen Boyce (Complainant) v. Union Electric Supply Co. Ltd. (Respondent) (*Withdrawn*)

1625-90-OH: Terry Bearman & United Electrical Radio & Machine Workers of Canada, Local 520 (Complainant) v. Boston Insulated Wire & Cable Co. (Respondent) (*Granted*)

CONSTRUCTION INDUSTRY GRIEVANCES

0234-89-G: United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) v. G. Torno Engineering Inc. (Respondent) (*Withdrawn*)

0235-89-G: G. Torno Engineering Inc. (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 38 (Respondent) (*Withdrawn*)

0709-89-G: United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) v. Marineland of Canada Inc. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

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**A Monthly Series of Decisions from the
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Selected decisions of particular reference value are
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THE OTTAWA CITIZEN, A DIVISION OF SOUTHAM INC.; RE OTTAWA NEWS-PAPER GUILD

0514-90-OH Robert Campbell, Complainant v. ABB Combustion Engineering Systems Combustion Engineering Canada Inc., Respondent

Discharge - Health and Safety - Complainant refusing assignment on ground that work-place material was possible carcinogen - Board concluding that complainant acted in good faith but did not have reasonable grounds to believe assignment to be dangerous - Four-week suspension substituted for discharge - Reinstatement ordered

BEFORE: *Michael Bendel*, Vice-Chair, and Board Members *R. W. Pirrie* and *P. V. Grasso*.

APPEARANCES: *Ronald Caza*, *Arlene McKechnie* and *Robert Campbell* for the Complainant; *Charles V. Hofley* and *Susan Richardson*, for the Respondent.

DECISION OF MICHAEL BENDEL, VICE-CHAIR, AND BOARD MEMBER P. V. GRASSO:
February 18, 1991

I

1. The name of the complainant is changed to read "Robert Campbell" and the name of the respondent is changed to read "ABB Combustion Engineering Systems Combustion Engineering Canada Inc.".

2. This is a complaint under section 24 of the *Occupational Health and Safety Act*. Section 24 reads, in part, as follows:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

...

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

3. The complainant, who had been employed as a welder by the respondent at its plant in Cornwall since 1980, was dismissed in April 1990 for refusing to comply with instructions to work on a particular assignment. According to the complainant, he refused the instructions because he believed the assignment posed an unacceptable risk to his health. Three investigations by the Ministry of Labour, which appeared to indicate that the job was unlikely to endanger the health of employees, had not satisfied him.

4. The complainant refused to work because of the respondent's use of a material known by the brand name of CER-Wool. The respondent used CER-Wool during the welding process for insulating metal that had been pre-heated. CER-Wool is described in the Material Safety Data Sheet ("MSDS") as a ceramic fibre of the mineral family. The complainant's concern was that, as mentioned in the MSDS and on the CER-Wool packaging, ceramic fibre is under investigation as a possible animal carcinogen.

5. Before 1989, the respondent had used CER-Wool in Cornwall for many years without incident. In May 1989, 35 employees, including the complainant, refused to work because of the respondent's use of CER-Wool. The Ministry of Labour investigated the work refusal. It concluded that the respondent could safely use CER-Wool if certain precautions were taken, and it issued orders to that effect. The respondent changed its process in response to the orders. In February 1990, another employee refused to work with a fibre-glass "blanket" which contained CER-Wool. The Ministry of Labour again investigated. It concluded that the employee's health was unlikely to be endangered by the fibre-glass blanket. In March 1990, the complainant refused to work on a job where CER-Wool was being used. The Ministry of Labour again investigated, but since it appeared that the process used by the respondent had not materially changed since the earlier work refusals, this investigation only examined an alleged reprisal against the complainant. When the complainant maintained his refusal to perform the work, the respondent terminated his employment for insubordination.

6. The complainant asks the Board to decide that he had reasonable grounds for believing the job was likely to endanger him and that the respondent was therefore precluded from taking any disciplinary action against him. In the alternative, the complainant asks the Board to substitute some lesser disciplinary measure for the discharge.

II

7. Although CER-Wool had been in use for many years at the shop, it appears that, before May 1989, no one there had seen or paid attention to warnings on the CER-Wool packaging. One warning, printed on the packaging itself, stated that "Ceramic Fiber is under investigation as a possible carcinogen based on animal studies and has been classified 2B by IARC". Another warning, on a label stuck onto the package, stated that "some medical studies suggest possible association between the ceramic fibers and the incidence of cancer in humans". The warnings also mentioned other possible health hazards from CER-Wool, including "serious lung disease (silicosis)" that might result from prolonged breathing of dust, as well as irritation to eyes, skin and respiratory tract. The following precautionary measures were stated on the label:

PRECAUTIONARY MEASURES: Avoid breathing dust and eye/skin contact. Wear approved respiratory protection, eye protection, suitable gloves, and protective clothing. Use adequate ventilation.

8. On May 17, 1989, some 35 employees, including the complainant, refused to work because of the presence of CER-Wool. They were working on the welding of rows of nipples on a steel "header", part of a boiler being made at the shop. The header, approximately 60 feet long, was pre-heated to 350 or 400 degrees Fahrenheit so as to avoid warping or stressing of the material during welding. The CER-Wool, in the form of a "blanket", was being placed directly on the header so as to maintain the pre-heat temperature. When particular sections of the header were being worked on, the CER-Wool was removed to expose the work area. As a result of handling, the CER-Wool blanket would crumble, generating dust on and around the header. In addition, in view of the type of welding process employed, the welders were required to remove a residue, known as "flux" or "slag", from the area they had welded at each step in the process, and this they did with "air-chippers", chisels operated with compressed air. The use of the air-chippers caused the CER-Wool dust to become airborne. Several employees were complaining of irritation of their respiratory tracts and the exposed parts of their bodies. Having read the warnings on the CER-Wool packaging, the employees refused to continue working with the CER-Wool.

9. Upon being informed of the work refusal, the respondent's supervisor of industrial relations, Susan Richardson, obtained for the employees the MSDS for CER-Wool. It failed to allay employees' fears. The version of the MSDS distributed to employees, it appears, is one that had been last revised in September 1985. Under the heading "Health Hazard Data", it stated the following:

CER-Wool can cause irritation to the eyes on contact and to the skin on prolonged contact. If the material contacts the skin it should be washed off thoroughly using a mild soap and water.

Summary: Ceramic Fiber is under investigation as a possible animal carcinogen. Animal studies to date are inconclusive. Exposures to dust from this product should be minimized until further animal and human studies are complete.

This product is suspected to be an animal carcinogen.

Medical conditions which may be aggravated: pre-existing upper respiratory and lung diseases such as, but not limited to, bronchitis, emphysema and asthma. Target Organ(s): Lung and skin.

Acute Health Effects: irritation of skin and upper respiratory system. Chronic Health hazards: can occur from long term excessive inhalation of crystalline silica dust. Crystalline silica in the lungs can produce a pneumoconiosis, commonly called silicosis, which is a slowly developing disease. Symptoms are usually delayed (10 years or more). *Smoking can increase risk of injury.*

10. The Ministry of Labour was notified of the work refusal, and an inspector conducted an investigation the next day. He issued the following orders:

Order No.0015 Pursuant sec. 70 of Reg. 692 compressed air or other compressed gasses shall not be used where the fibre dust from the CER-Wool will be blown into the air.

Order No. 0016 Pursuant sec. 3(2) of Reg. 654/86 Engineering controls such as the use of vacuum with a machine equipped with HEPA filter and personal protective equipment shall be utilized to prevent exposure of workers to dust/fibre from CER-Wool in excess of exposure criteria.

Order No. 0017 Pursuant sec. 83 of Reg. 692 workers required to wear protective equipment i.e. respirators shall be instructed in proper fit, care and use.

Order No. 0018 Orders #0015, 0016, 0017 shall be complied with prior to resuming welding operations where CER-Wool is present i.e. headers.

The complainant, being one of the refusing workers and also a union steward, was one of the persons contacted by the inspector. The inspection report was posted throughout the shop.

11. The inspector had been accompanied on his visit to the plant by a hygienist from the Ministry. On May 19, the hygienist wrote to the employer to provide additional observations about the safe use of CER-Wool. The letter reads as follows:

This letter will confirm the findings of the Ministry of Labour's investigation of CER-Wool Blanket used as an insulating material at your plant.

The product CER-Wool Blanket is considered to be a Mineral Wool Fiber containing less than 1% crystalline silica (cristobalite) and therefore has an allowable exposure of 10 mg/m³ (milligrams per cubic meter) as nuisance dust. This is specified in the MSDS (Material Safety Data Sheet) provided and is in keeping with the assigned exposure value in the Regulations respecting Control of Exposures to Biological or Chemical Agents, O. Reg. 654/86 (page 83).

All man-made fibres, including mineral wool fibres, are being studied from a cancer-producing potential. There is no evidence, at this time, to support this. However, it is best to err on the side of safety.

It is not felt that the heat generated during the present operation on the headers is sufficient to produce significant amounts of silica (cristobalite). This will be confirmed by analysis of the bulk sample.

Despite this, the available protective equipment (gloves, and NIOSH-approved dust mask/respirator) is providing adequate and appropriate protection against this remote possibility.

The company will not use compressed air to blow the insulation from the welding joints, as this causes excessive airborne dust and can cause eye and skin irritations.

The company is making an effort to replace the CER-Wool Blanket strips on the header with another product which will not crumble, deteriorate or become friable with handling. The CER-Wool Blanket covering the ceramic heating elements is not felt to be a problem. The CER-Wool Blanket used in other applications at Combustion Engineering is also felt to be acceptable.

A field visit report will be forthcoming with the details of my findings.

I trust this meets the needs of the workers.

[emphasis added]

This letter, too, was posted at the shop. A few days later, the hygienist prepared a more detailed report on the inspection, which was also posted. It read, in part, as follows:

When the welders performing this task came down with rashes on their upper chest, forearms and face, the MSDS for CER-Wool was requested. *It indicated the product composition as ceramic fibre and indicated it as a suspect animal carcinogen. The major hazard indicated, however, was in product degradation, when cristobalite, a type of crystalline silica, was formed.*

• • •

The fibres making up ceramic fibre insulation consist of alumina-silicate and are vitreous in their virgin, manmade state. *These fibres pose no known health hazard and the dust generated is regarded as nuisance dust.* When exposed to high temperatures over extended periods of time,

these alumina-silicate fibers diversify and undergo conversion to cristobalite (crystalline silica). Cristobalite is well known for its toxic effects...

...

A bulk sample of settled dust was taken from the header that had been welded. It was analyzed by the Ministry of Labour Laboratories and the results are attached... This result supports the impression made at the time of the visit that air-borne silica dust (cristobalite) was unlikely.

...

The effects of CER-Wool can, however, cause irritation to the eyes, skin and respiratory tract on contact...

The action of the chipper on the CER-Wool adhering to the header around the tube nipples, coupled with the deteriorating CER-Wool (taking CER-Wool strips on and off the tube nipples, and heating, causes the material to crumble) caused ceramic dust to become airborne. These fibres actually "fly" back at the welders at high velocity...

...

The company supplied the 3M 9900 respirators to all workers returning to work in the main bay. This was done to err on the side of safety...

...

The health and safety of the welders was likely to be endangered under the conditions noted at the time of the work refusal. However, by implementing changes to the process, specifically and primarily, ceasing to use air-powered equipment for blowing CER-Wool material, similar adverse health effects are not likely to occur. Therefore the future health and safety of the welders is not likely to be endangered.

[emphasis added]

12. The respondent took certain steps to comply with the orders issued by the Ministry of Labour. According to Ian McPherson, Shop Supervisor, high-quality respirators were made available to everyone in the shop; an ion-charged product known as "Dustbane" was used on the floors to attract CER-Wool dust particles; and welders were instructed to use manual chipping hammers instead of air-chippers. Mr. McPherson testified that, in his view, this constituted compliance with the orders. He acknowledged that some employees might have continued using air-chippers as they were much more efficient than manual hammers.

13. Work on the headers, still insulated with CER-Wool, resumed within a day or so of the refusal. The respondent, however, immediately began investigating with suppliers possible substitutes for CER-Wool. Within a week of the refusal, the employer started using fibre-glass blankets instead of CER-Wool. Although fibre-glass has less insulating capacity than CER-Wool, the respondent was able to compensate for this by adjusting the pre-heat temperatures. Employees resumed using air-chippers.

III

14. In the summer of 1989, the respondent started work on a type of header made of different steel. The steel was known as "X-20", and the header, too, was referred to as. "the X-20". Because of the metallurgical properties of this steel, the pre-heat required was at a higher temperature than with the other headers, 500 degrees Fahrenheit, and a steady temperature was more critical. The respondent decided to use a different technique to maintain the temperature. An enclosure, known as an "oven" or a "coffin", was constructed out of steel, wire mesh and CER-Wool.

The enclosure, built in segments, completely surrounded the header. The CER-Wool was contained by the wire mesh and was close to, but not in contact with, the header. When the welders were due to work on a particular section of the header, a segment of the oven was removed. In order to maintain the pre-heat temperature of the exposed portion of the header and protect the welders from contact with the hot metal, an insulation blanket, made of a tight-weave fibre-glass and filled with CER-Wool, was used. Another fibre-glass blanket was put between the header and the blanket filled with CER-Wool. This system was designed to ensure that proper heat was maintained, while not exposing employees to dust from CER-Wool. Employees used air-chippers. They wore respirator masks while welding, but would take them off as they backed away after completing a weld.

15. There were two problems with this new process. The first was that the CER-Wool in the oven would sometimes fall apart and drop to the area in which the welders were working or onto the floor. The second was that the blankets containing the CER-Wool deteriorated with use. The fibre-glass hardened and became brittle. The blankets would rip if placed directly in contact with the header. Sometimes the blankets would be burned, although they were not inflammable. Holes appeared. The result was that CER-Wool escaped from the blankets.

15. In February 1990, Chris Martin, a welder, refused to work with these fibre-glass blankets filled with CER-Wool on the ground that they were likely to endanger his health. The Ministry of Labour investigated. Mr. Martin's main concern, it appears, was with the possibility that, with the deterioration of the blankets and the high temperatures of the headers, toxic substances could be produced from the fibre-glass. That, in any event, was how the Ministry of Labour inspector, Mr. Guy Nadeau, described Mr. Martin's position in his report. The conclusion in the report, based on the MSDS for the fibre-glass was that, below 1,000 degrees Fahrenheit, toxic substances would not be produced, although ammonia and formaldehyde, both toxic, could be produced above that temperature. Since the temperature of the X-20, according to the report, was between 300 and 350 degrees Fahrenheit, Mr. Nadeau concluded that there was no danger to health. (The evidence the Board received was that the X-20 was, in fact, pre-heated to about 500 degrees Fahrenheit, rather than 300 to 350 degrees.) This work refusal or, at any event, the Ministry of Labour's investigation did not therefore relate to the safe use of CER-Wool.

16. The complainant, as a union steward, was involved in Mr. Martin's work refusal. He was one of the persons contacted by Mr. Nadeau. The evidence, however, was not clear as to whether he saw a copy of Mr. Nadeau's report before his own work refusal the following month.

IV

17. Work on X-20 headers continued throughout the winter and spring of 1989-90. It was not a popular assignment for welders because of the heat. For this reason, welders were frequently rotated. There were about 15 welders qualified to work on the X-20, and about six were assigned each week to the job, three at a time. The complainant was not assigned to the X-20 until March 1990. The respondent says his turn never came up before then. However, the complainant says he was not assigned because the respondent knew that he would object to working with the CER-Wool, which might lead to another general work refusal.

18. On March 21, 1990, the complainant was assigned to work on the X-20. At least a week earlier, the complainant had made it clear to his foreman, Chris Armstrong, that, if assigned to the X-20, he would refuse to work. Mr. Armstrong had relayed this information to Mr. McPherson. Mr. Armstrong testified that, in his view, it was not fair to refrain from assigning the complainant to the X-20 since other employees who were working there were also reluctant to do so. The decision to assign the complainant to this job was Mr. McPherson's. As the respondent fully expected,

the complainant, on March 21, refused the assignment. A meeting was held a few minutes later in the foremen's office. Messrs. McPherson and Armstrong were present for the respondent; the complainant and a steward, Richard Miron, were also there. The complainant stated that he was exercising his right to refuse work that endangered his health. He stated that he was aware of the earlier rulings by the Ministry of Labour, resulting from the May 1989 and February 1990 work refusals, and was aware of the information in the MSDS. He stated that his concern was that CER-Wool was a possible carcinogen. A brief discussion ensued about the earlier investigations. The complainant said: "I know what they all say, but that's not good enough for me."

19. Mr. McPherson immediately informed the safety committee of the complainant's refusal. Three employees on the committee, John Lafave, Richard Beauregard and Eli Chouinard, went to the work site to investigate, although not before expressing some irritation about this issue being raised again. (Messrs. Lafave and Chouinard, respectively a radial drill operator and a welder, were bargaining unit employees, and Mr. Beauregard was Shipping Foreman.) The complainant remained in the foremen's office. The safety committee members returned after 10 or 15 minutes. They reviewed the reports on the earlier refusals. There was a brief discussion with the complainant. Mr. Beauregard, the co-ordinator of the committee, then announced that the three members were unanimously of the view that the complainant's health was not likely to be endangered by working on the X-20.

20. According to the evidence of Mr. Lafave, when he went to the job site with the other safety committee members, he wanted to see if the orders issued by the Ministry of Labour in May 1989 were being complied with. Mr. Lafave testified that he noted air-chippers being used on the X-20. He felt that the use of CER-Wool had been drastically reduced, by some 90%, since the May 1989 refusal. He noted that Dustbane was being used to control the CER-Wool dust, but that no other dust controls were in place. There may have been a small amount of CER-Wool on the floor near the X-20, but not in the area where the welders were working. He felt that, taking all of this into account, there was no danger for the complainant. Mr. Beauregard stated in his testimony that he was mainly interested in knowing whether there had been any changes since the work refusal the previous month. He concluded that the process had not changed since then. He did not question what materials were inside the fibre-glass blankets. He merely noted that everything seemed to be the same as earlier. He testified that he did not feel qualified to question the conclusion by the Ministry of Labour just a few weeks earlier.

21. When the complainant heard the conclusion of the safety committee members, he maintained his refusal to work on the X-20. Mr. McPherson told the complainant to go home and wait for the result of the Ministry of Labour's investigation. According to the complainant, he offered to work on any other job, and there were other jobs to which he could have been assigned that day; but Mr. McPherson refused to assign him to anything else. (There was no evidence presented on behalf of the respondent that other welding work was not available for the complainant at the time. The complainant maintained that, in his ten years with the respondent, there had never been a lack of welding jobs to be performed.) Once at home, the complainant contacted an inspector from the Ministry of Labour, Mr. Guy Nadeau, who had conducted the investigation of the work refusal the previous month. He told Mr. Nadeau of his work refusal and of being sent home. Mr. Nadeau, according to the complainant, said that he would investigate the alleged reprisal by the respondent, but not the work refusal itself.

22. On March 22, 1989, Mr. Nadeau went to the plant in Cornwall. He spoke to Ms. Richardson, to Messrs. McPherson and Beauregard, and to the union president, among others. He later met the complainant at a restaurant. The complainant testified that Mr. Nadeau asked him if the process had changed. He testified that although he was somewhat confused by the question, he

replied that the process had not changed. According to Mr. Nadeau's written report, the question he asked the complainant was whether "the process had changed since the first work refusal on CER-Wool fibre and the second work refusal on ceramic fibre". The complainant, according to Mr. Nadeau's report, stated that the process was the same. In his written report, issued the next week, Mr. Nadeau, after reciting some of the background to the complainant's work refusal, concluded as follows:

The Ministry of Labour officer did not take a decision regarding this work refusal because he was investigating an alleged reprisal. He informed the management, the J.H.S.C. and the union that if the process did not change, the decision of Ministry of Labour officer is the same.

23. On March 23, after Mr. Nadeau's conclusions had been communicated to those concerned, but before the release of the written report, the complainant attended a meeting at the plant. He maintained his refusal to work on the X-20. He asked to be assigned to some other job. The respondent refused. A discussion ensued. The complainant maintained that he was concerned about getting cancer from working in the presence of CER-Wool. Mr. McPherson, noting that the complainant smoked cigarettes, questioned the seriousness of his concern about the carcinogenic properties of CER-Wool. The complainant said he wanted a guarantee that he would not get cancer from working with the CER-Wool. Mr. McPherson testified that he believed the complainant's work refusal was motivated solely by his fear of cancer; however, he felt that, by this stage, the issue had become one of insubordination. He told the complainant he was suspended indefinitely.

24. After the complainant had left the premises on March 23, the respondent reviewed the situation. It decided that the complainant should be given a formal invitation to return to work and that, if he refused to work on the X-20, his employment should be terminated. This was conveyed to the complainant in a letter dated March 27, which was given to him when he returned to the plant to file a grievance. The letter, signed by Ms. Richardson, contained the following:

Bob, I would encourage you to review your position concerning your work refusal. We will give you until 07:00 hours, Monday, April 2, 1990 to return to work on assignment 3B9-432 header. Should you not appear, we will consider you to have abandoned your job with this company.

25. On April 2, the complainant did return to the plant, but he maintained his refusal to work on the X-20. He again asked for another assignment. The respondent again refused to give him another one. He was told he was fired, and was given a hand-written note stating that the discharge was for his "act of wilful disobedience and insubordination".

V

26. In addition to the evidence summarized above, the Board heard evidence dealing with various other matters.

27. The complainant suffers from bronchitis. At one point, he referred to his bronchial problems as a reason for not wanting to work with CER-Wool. According to an inter-office memorandum filed in evidence, however, his doctor stated, in August 1989, that, if he used proper safety equipment, there were no restrictions on the work he could perform. Although the complainant's bronchitis was mentioned before the Board, the evidence is clear that when he refused his assignment to the X-20 in March and April 1990, he expressed concern about cancer and not about aggravating his bronchitis.

28. Conflicting evidence was presented on the general ventilation of the shop. The shop where the X-20 job was located is a large building, 500 feet long, with 55-foot high ceilings. Although Mr. McPherson testified, at one point, that there was no exhaust system in the shop, he

later mentioned that exhaust fans were placed every 40 feet along the east and west walls of the shop. This last observation was confirmed by Mr. Beauregard, who added that there were two functioning ceiling fans as well in March 1990 (in addition to one broken ceiling fan). The complainant testified that the small fans on the walls did not work, and he did not think the ceiling fans worked either. "Smoke hogs" were available, but they had not been used for a couple of years. When weather permitted, large doors at each end of the shop were sometimes opened to provide a natural flow of air. According to Mr. McPherson, some welders used portable fans to draw dust away from them, although only three or four such fans were available at the shop. Mr. Armstrong, however, stated that, in view of the critical temperature of the X-20, portable fans could not be used by welders on that job.

29. Conflicting evidence was also presented about the condition of the fibre-glass blankets being used on the X-20 and the respondent's policy of replacing them. Each set of blankets cost between \$4,000.00 and \$5,000.00. Mr. McPherson testified that employees were never required to use blankets that were in poor condition, although he acknowledged that sometimes employees did use such blankets. Several other witnesses, however, stated that the blankets were generally in a poor condition and CER-Wool was escaping from them almost constantly. Mr. McPherson also stated that labourers were assigned to clean up loose CER-Wool in the area of the X-20. Other witnesses, however, stated that the area would only be cleaned up if employees complained about the conditions. As for the use of Dustbane to control the CER-Wool dust, Mr. McPherson stated that it was in use, while others stated that it was hardly ever available. The Board heard little evidence about the cleanliness of the area or about the condition of the blankets at the time of the complainant's work refusal; evidence on this was limited to Mr. Lafave's observation that, when he inspected the work area on March 21, 1990, there may have been a small amount of CER-Wool on the floor near the X-20, but not in the area where the welders were working. The complainant, it should be noted, did not in fact go to the work area on March 21 or thereafter and had no information on the cleanliness of the area or the condition of the blankets at the time of his refusal.

VII

30. The relevant parts of section 24 of the *Occupational Health and Safety Act* were quoted earlier in this decision. Also of relevance to this complaint is section 23 of the Act, which reads, in part, as follows:

23.-(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or

- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the work place or the part thereof which is being investigated unless the worker to be so assigned has been advised of the refusal by another worker and the reason therefor.

31. The principal question the Board has to address is whether the complainant "acted in compliance with this Act" (see section 24 (1)), and, in particular, whether he acted in compliance with section 23 (6). If, to use the language of section 23 (6), he had "reasonable grounds to believe" that working on the X-20 would endanger him, his refusal to work would be "in compliance with this Act". An employer is prohibited, by section 24 (1), from dismissing an employee for acting in compliance with the Act. As the Board has noted in previous decisions, work refusals

only come within the scope of section 23 (6) if employees have “reasonable grounds to believe” that their health or safety is in danger, whereas, under section 23 (3), employees may refuse to work if they have “reason to believe” that there is a danger. Section 23 (6) places a heavier onus on the employee. The test under section 23 (6) is an objective one. The reason for this difference is that section 23 (6) applies after the employee’s refusal has been investigated.

32. The complainant’s case for believing that there was a danger of cancer from working on the X-20 is based largely on the MSDS for CER-Wool and the orders issued by the Ministry of Labour in May 1989. The complainant says that he knew from this information that CER-Wool was under investigation as a possible carcinogen. He also knew that certain precautions, particularly adequate ventilation, were indicated on the packaging and in the MSDS. There was little or no local or general ventilation at the shop. He further knew that the Ministry of Labour had been of the view, in May 1989, that air-chippers should not be used, and had so ordered. Employees, however, were still using air-chippers at the time of his work refusal. He also knew that in May 1989 the Ministry had ordered that “engineering controls” be utilized to prevent dust exposure. No engineering controls were in place.

33. Mr. Caza, on behalf of the complainant, also noted that the Ministry did not conduct an investigation of his work refusal as such, and that the investigation conducted by the safety committee was not conducted in the complainant’s presence, which is contrary to section 23 (4) of the *Occupational Health and Safety Act*. Counsel argued that this had denied the complainant the opportunity of dialogue with the inspector and the safety committee about his fears. Counsel referred, in this regard, to *Sidbec Dosco Inc.*, [1988] OLRB Rep. Dec. 1334.

34. The question the Board has to consider can be stated as follows: given the use being made of CER-Wool in March 1990 and in light of the knowledge the complainant had acquired about the product, did he have reasonable grounds to believe, in March 1990, that he might contract cancer by working on the X-20?

35. The complainant’s refusal was not based on the condition of the fibre-glass blankets enclosing the CER-Wool, or on the cleanliness or housekeeping in the area of the X-20. He did not even visit the work area to check on these matters before refusing to work. His refusal must therefore be understood as an objection to working with the fibre-glass blankets enclosing the CER-Wool and with the “oven” containing the CER-Wool, regardless of their condition.

36. The hygienist’s letter of May 19, 1989, had this to say on the risk of cancer from working with CER-Wool:

All man-made fibres, including mineral wool fibres, are being studied from a cancer-producing potential. There is no evidence, at this time, to support this. However, it is best to err on the side of safety.

For the hygienist, erring on the side of safety from a cancer perspective appears to have meant that welders should use respirators and that air-chippers should not be used. On the question of air-chippers, the hygienist’s letter is open to interpretation as to whether the air-borne dust was likely to cause eye and skin irritations or to cause cancer. However, it is abundantly clear from the hygienist’s letter and report that cancer was not regarded as a significant health risk for the welders. The hygienist’s main concerns were with irritation of skin, eyes and respiratory tract. The other principal concern was with cristobalite, although, in view, of the temperatures to which the CER-Wool was exposed, this risk was not found to be present.

37. If the hygienist did not treat the risk of cancer as being a significant one in May 1989,

there is no rational basis, in our view, on which anyone should have been concerned about this risk in March 1990. The manner in which CER-Wool was being used in March 1990 was not the same as in May 1989. In May 1989, no effort was being made by the respondent to control dust or loose fibres from the CER-Wool. In particular, the CER-Wool was being placed directly on the header and was crumbling when moved by the welders. In March 1990, on the other hand, CER-Wool was contained in fibre-glass blankets, from which it would only escape if the blankets deteriorated; it was also used in the “oven” enclosing the header and was not extensively handled by employees. As a result, there was much less CER-Wool dust or loose fibres in March 1990. In addition to a modified use of the CER-Wool, employees, who had been alerted to the potential danger of the product, were using dust masks or respirators while working with it, which they had not been doing in May 1989.

38. It is true that, in March 1990, the respondent was not in compliance with the orders issued in May 1989. But conditions had changed. Air-chippers were being used in March 1990, contrary to the orders, but there was no longer nearly the same amount of CER-Wool dust or loose fibres as there had been in May 1989, and, moreover, welders were wearing respirators. The orders had also called for “engineering controls such as the use of vacuum with a machine equipped with a HEPA filter”, and the complainant made much of the respondent’s failure to institute such controls. However, the orders only required such engineering controls “to prevent exposure of workers to dust/fibre from CER-Wool in excess of exposure criteria”, and there was no basis for believing that, in the conditions of March 1990, exposure criteria were being exceeded.

39. The Board is somewhat concerned that the complainant was not invited by the investigating members of the safety committee to accompany them to the work area, since the purpose of the worker being present is to facilitate dialogue on the safety problem under investigation. However, the complainant was looking for a “guarantee”, as he put it, that he would not get cancer from working in the presence of CER-Wool, and he had told Mr. McPherson that he knew what all the experts said and that was not good enough for him. In these circumstances, it seems unlikely that anything the safety committee could have said to him would have caused him to change his mind about working on the X-20. For the same reason, we do not think that a thorough investigation of the work refusal by the Ministry of Labour inspector in March 1990 would have changed the complainant’s mind.

40. It is important to note that section 23 (6) of the Act refers to equipment, machines, etc. that are “likely to endanger” an employee. We are not called upon in this case to define the precise degree of likelihood of harm that is intended by these words. However, in the Board’s view, employees do not come within the scope of the subsection by demonstrating that they know of suggestions or speculation that their health might be endangered by the use of a product, machine, etc. In the present case, the complainant knew that there were animal studies suggesting that CER-Wool might cause cancer in humans. In view of the precautions taken by the respondent in its use of CER-Wool, we are not persuaded that this knowledge gave him reasonable grounds for believing that the respondent’s process was “likely to endanger” him. What the complainant actually sought from the respondent was a “guarantee” (to use his own word) that working on the X-20 would not lead to cancer. It is obvious that the inability of anyone to state, with scientific certainty, that cancer could not be caused by working on the X-20 did not provide the complainant with “reasonable grounds to believe that ... [it was] likely to endanger” him.

41. For all of these reasons, we have concluded that the complainant did not have reasonable grounds to believe that working on the X-20 was likely to endanger him.

VIII

42. There remains for consideration the appropriateness of the disciplinary sanction imposed on the complainant. As noted, the respondent suspended him indefinitely on March 23, and then dismissed him on April 2.

43. We note, in the first place, that the respondent does not dispute that the complainant's work refusal was motivated solely by an honest belief that he risked contracting cancer by working on the X-20. We would add that Mr. McPherson did, at one point, question the seriousness of the complainant's fear of cancer since the complainant smokes cigarettes. This may have caused the respondent's management to be a little skeptical about the reason for the work refusal, but there has been no suggestion that the complainant acted out of any ulterior motives.

44. It should be mentioned at this point that, according to some evidence presented to the Board, the work of welders is inherently dangerous. A union publication entitled "Welding Safety" lists numerous diseases - including heart disease, cancer, softening of the bones, visual and speech disorders - that are hazards of the occupation. According to this same publication, "These risks can be lowered if safe welding practices are used". There was some suggestion in the submissions of counsel for the respondent that the generally hazardous nature of the occupation should lead us to discount the complainant's fears about cancer being caused by the CER-Wool. In our view, even though welders are exposed to various risks, they are not thereby disentitled from asserting their rights under the *Occupational Health and Safety Act*. Moreover, the generally hazardous nature of an occupation should not, in itself, cast any doubts on the *bona fides* of employees who exercise their rights under the Act. We similarly do not accept that the complainant's use of cigarettes should mean that his fears of cancer from his work are to be treated with any less seriousness than the fears of a non-smoker. By smoking, an employee does not waive statutory rights or accept the risk of cancer from sources unrelated to cigarettes.

45. We also note that the complainant had been employed with the respondent for ten years, that he is 34 years old and that he is married with three children. He had no prior disciplinary record.

46. Finally, we note that the respondent made little or no attempt to discuss the substance of the complainant's fears with him, although it did give him copies of the MSDS for CER-Wool and the reports generated by the earlier work refusals. Relying on its power to assign employees to the jobs it selected, the respondent ordered the complainant to work on the X-20, with minimal discussion of his fears.

47. It appears to us that, since this was a ten-year employee who was acting in good faith, the least the respondent should have done was to discuss with him the fears he had and try to persuade him that he was mistaken. Although, in our view, the complainant had no reasonable basis for fearing for his health, his fears were by no means groundless. The failure of the Ministry of Labour inspector to conduct an investigation of the danger of cancer in March 1990 made it all the more important, in our view, for the respondent to arrange for a knowledgeable person, from inside or outside its staff, to talk to the complainant, in a helpful rather than an adversarial way, about the risks of cancer associated with working on the X-20. It is also worth recalling that the reports generated by the 1989 work refusal had not focused on the danger of cancer. The respondent knew at least a week before assigning the complainant to the X-20 that he would refuse the assignment. It therefore had ample lead time to arrange for a discussion of the risks without interfering with production. Given the complainant's adamant refusal to work on the X-20, we are by no means sure that anyone could have persuaded him to work on this job, but, in our view, it bordered on the callous for the respondent to have dismissed him without doing more to inform him

and allay his fears. Even in the absence of such a dialogue, a stiff suspension might have sufficed to persuade the complainant that he was mistaken in the stand he was taking.

48. For these reasons, we have concluded that dismissal, in the circumstances of this case, was an inappropriate and unreasonable response by the respondent. Since the collective agreement does not contain a specific penalty for the complainant's infraction, the Board has the power to substitute another penalty for the discharge. In our view, the discharge should be revoked and a four-week suspension without pay substituted (which will be in addition to the suspension without pay that preceded the discharge).

49. We therefore order that the complainant be reinstated in his employment without loss of seniority and that he be compensated for all wages and benefits lost as a result of the discharge, subject to a four-week suspension. As requested by the parties, the Board will remain seized for the purpose of resolving any disagreements about the compensation due to the complainant.

DECISION OF BOARD MEMBER R. W. PIRRIE: February 18, 1991

1. While I concur with the majority decision that the employer did not violate the *Occupational Health and Safety Act*, I must dissent with respect to the proposal to substitute a four week suspension for the discharge imposed by the employer.

2. When Mr. Campbell refused to do the work to which he was assigned on March 21, 1990 following the Health and Safety Committee inspection of the work site he was sent home. When Mr. Campbell continued his refusal on March 23rd following the Ministry of Labour report on the incident he was suspended until April 2nd. When Mr. Campbell refused to do the work to which he was assigned on April 2nd - after a six working day suspension - he was terminated. In some fashion the majority of this panel seems to feel a 20 working day suspension "...might..." have changed Mr. Campbell's mind. Such logic escapes me.

3. Further, I take exception to the suggestion at paragraph 47 of the award that the employer's actions "...bordered on the callous..." because it did not do more to inform Mr. Campbell and to allay his fears. It is because an employer might be prejudiced and might mislead employees concerning work place health and safety that the policy makers remove the employer from the scene of a work refusal. Instead, they give authority to investigate to a plant Health and Safety Committee comprised of workers and union representatives. In this instance the Committee said the work was safe, and Mr. Campbell was so advised. The policy makers then give authority to a Ministry of Labour inspector and their support people. In this instance, the inspector and on two previous occasions in the past 11 months, Ministry Industrial Hygienists said the work was safe, and Mr. Campbell was so advised. However, in some fashion if the employer sent in one of its own knowledgeable people or itself hired someone from outside to talk to Mr. Campbell, he "...might..." have done the work to which he was assigned. This of course is in the face of Mr. Campbell's statement to Mr. McPherson -captured at paragraph 39 - that "he knew what all the experts said and that was not good enough for him." Such logic escapes me.

4. In conclusion, I see nothing inappropriate or unreasonable in the employer's action of terminating Mr. Campbell.

1872-90-FA Teamsters Local Union 419, Applicant v. Arrow Games Inc., Respondent

Change in Working Conditions - Unfair Labour Practice - Employer substantially reducing hours of work - No reduction in amount of work available, but concern with productivity leading employer to have work done elsewhere - Board finding "freeze" violation and rejecting employer's argument that union estopped from relying on absence of specific consent - Compensation ordered

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. Lear* and *P. V. Grasso*.

APPEARANCES: *Dave Watson* and *Bob McGibbon* for the applicant; *R. M. Parry*, *Steven Wilson*, *Jack Proudman* and *Peter Cobbold* for the respondent.

DECISION OF THE BOARD; February 19, 1991

1. Two outstanding matters arose in the context of Board File No. 1872-90-FA and pursuant to Minutes of Settlement filed by the parties. The first was the settlement of their first collective agreement. A decision with respect to that matter issued on January 14, 1991. The second matter concerns a dispute between the parties with respect to the legal effect, and remedy if any, of the employer's action in reducing hours of work. It is alleged by the applicant that the employer violated subsection 79(1) of the *Labour Relations Act* (the "Act") and that compensation is owing to the employees involved. The respondent employer disputes this assertion and also argues that the applicant is estopped from asserting or relying on the absence of "strict and specific" consent under section 79.

2. Prior to the hearing the parties exchanged and filed written briefs which included an agreed statement of fact and each party's submissions with respect to this issue. Further written submissions were made which the panel has received and considered. There is no dispute that at the relevant times the parties were subject to the "freeze period" established by subsection 79(1).

3. The respondent employer commenced operations in Mississauga in May of 1988. The essential nature of its business is the processing and distribution of custom-made bingo supplies. There are currently eleven employees in the bargaining unit.

4. The respondent evaluates its operation by use of a productivity factor measured in cases per hour produced. At one of its parent company's U.S. plants, employees produce on average 4.1 cases per hour. The respondent had set what it felt to be a reasonable, yet minimum, threshold of 3.0 cases per hour for the Mississauga operation. For the first three months of 1989 productivity averaged 2.8 cases per hour. In April 1989 the respondent implemented a productivity bonus plan pursuant to which bonuses were paid. However, in the summer of 1989 following an audit, the respondent discovered that production numbers had been altered intentionally or through gross negligence and actual cases produced were, in fact, closer to 2 per hour than the 3 or more per hour that was being reported. The plant manager was dismissed immediately.

5. Levels of productivity have not met the respondent's expectation. The applicant does not accept the company's expectation of 3 cases per hour as reasonable. In reviewing the figures provided by the respondent, the case per hour production level over the time of its operation in Mississauga has ranged between 2 and 3 cases per hour with one or two weeks falling on either side of that range.

6. The applicant was certified on November 23, 1989. Written notice to bargain was given

to the respondent on November 28, 1989. The parties met in negotiations beginning on March 27, 1990. There were eight negotiating sessions between March and August of 1990. Subsequently, on August 22, 1990 the parties entered into Minutes of Settlement of a section 89 complaint which ultimately led to this matter being placed before this panel.

7. Productivity has been a major concern of the respondent since at least the summer of 1989 following the audit. It continues to view it as a serious problem. It has also been an issue in the parties' negotiations. In several of the negotiating sessions the respondent raised the problem of poor productivity and sought the union's assistance in addressing it. Mr. McGibbon, on behalf of the trade union, has attended the plant and spoken directly to employees on at least two occasions and a meeting was held during which both management and Mr. McGibbon addressed the employees on concerns regarding poor productivity.

8. Prior to commencing negotiations, a meeting was held on February 15, 1990 to discuss productivity. Mr. Proudman, Vice-President, Human Resources, advised Mr. McGibbon, *inter alia*, that the respondent was forced to cut back from a five-day to a four-day work week effective February 19, 1990. Mr. McGibbon was further advised that the respondent would produce product at its Cleveland head office and forward it to Toronto for distribution in order to meet customer deliveries. Mr. McGibbon did not state that he agreed or consented to the reduction in hours of work. Starting the week of February 19, 1990, the work week was reduced to four days for employees in the bargaining unit, except for the driver and the shipper/receiver who continued to work five 8-hour days.

9. Subsequently, at the first negotiating session held on March 27, 1990, Mr. Proudman advised Mr. McGibbon that the respondent was moving to a three-day work week commencing April 2, 1990 in response to poor production. During that meeting Mr. Proudman reviewed the respondent's ongoing problem of poor productivity. Mr. McGibbon indicated that he would like some way of checking the respondent's production figures, indicating that the employees were questioning them. At this time, Mr. McGibbon also indicated that the applicant was looking into filing a complaint at the Board against the respondent for reducing the hours of work.

10. On March 28, 1990, Mr. McGibbon attended the plant and met with Mr. Cobbold, General Manager and a Mr. Meister. Mr. McGibbon toured the plant and the parties again discussed production levels. That same day the respondent forwarded a letter to Mr. McGibbon confirming their concern regarding poor productivity and the reduction to a three-day work week effective April 2, 1990. A notice to all hourly-paid staff was posted in the plant on March 28, 1990 which addressed the issue of poor productivity and announced the effective date of the three-day work week. That notice indicates that in the respondent's view a reduction in hours of work was preferable to a lay-off.

11. At no time did the union express its consent to the reduction in the hours of work for the employees in the bargaining unit. On March 14, 1990 (unknown to Mr. McGibbon) the applicant filed a section 89 complaint with the Board objecting to the reduced work week which ultimately led to this proceeding before this panel.

12. On April 30, 1990 the respondent reverted to a five-day work week. The agreed facts provide no explanation for why this occurred. During the periods of the reduced work week, the respondent arranged for the product it typically produced to be produced in Cleveland.

13. Subsection 79(1) provides:

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement

is in operation, *no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,*

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,
- as the case may be; or
- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

[emphasis added]

14. The purpose of the statutory freeze provision found in section 79 was described in *A E S Data Limited*, [1979] OLRB Rep. May 368 at para. 10:

10. The purpose of section 70 is to maintain the prior pattern of the employment relationship, in its entirety, while the parties are negotiating for a collective agreement. This ensures that they will have a fixed basis from which to begin negotiations, and prevents unilateral alterations in the *status quo* which might give one party an unfair advantage either from the point of view of bargaining or of propaganda. The *status quo* includes not only the existing terms and conditions of employment but also any other established benefits which the employees are accustomed to receive, and which can therefore be considered to be "privileges." It is clear that express promises, or a consistent pattern of employer conduct can give rise to such privileges and that they are caught by the statutory freeze. It should be noted, however, that section 70 also freezes the "rights and privileges" of the employer. The section requires *both* parties to maintain the existing pattern of their relationship; that is, to conduct their business as before. In *Spar Aerospace Products Limited*, [1978] OLRB Rep. Oct. 859, the Board discussed the effect of section 70 in the following way:

The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

[emphasis in original]

15. That discussion was further refined in *Simpsons Limited*, [1985] OLRB Rep. April 594 (Tacon panel):

28. The Board could have interpreted section 79 so as to freeze the precise conditions extant at the time the statutory provision was triggered. The Board, though, has consistently rejected that approach as an unreasonable interpretation of the legislation. In the Board's view, such an interpretation would effectively paralyze an employer's operations for the duration of the statutory freeze, a period which could be quite lengthy. In effect, the business as before formulation in *Spar Aerospace*, *supra*, was the Board's response to too expansive a view of employee privileges. To paraphrase *Spar Aerospace*, the employer's right to manage its operation was maintained subject to the condition that the operation conform to the pattern established when the freeze was triggered.

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30. The freeze provisions catch two categories of events. There are those changes which can be measured against a pattern (however difficult to define) and the specific history of that employer's operation is relevant to assess the impact of the freeze. There are also first time events and it is with respect to that category that the business as before formulation is not always helpful in measuring the scope of employees' privileges. Some first time events have been readily rejected by the Board, where, for example, the employer has instituted parking fees for the first time during the freeze: see *Scarborough Centenary* [sic] *Hospital*, [1978] OLRB Rep. July 679; *St. Joseph's Hospital*, September 1984, unreported, File No. 0965-84-U(A). On the other hand, the Board has upheld an employer's right to lay-off employees during the freeze (assuming there is no anti-union animus in the decision): *Simpsons*, *supra*; *Burlington Carpet Mills*, *supra*; *The Winchester Press*, *supra*; *Grey Owen Sound*, *supra*; *Deacon Brothers*, *supra*; *Airline (Malton) Credit Union*, *supra*. This right has been confirmed even where the first instance of layoff occurred during the freeze (see *Grey Owen Sound*, *supra*; *The Winchester Press*, *supra*; and where the layoffs had occurred elsewhere in the employer's operation but not at the specific location in question (see *Simpsons*, *supra*). The respondent in the instant case cited *Corporation of the Town of Petrolia*, *supra*, for the proposition that the employer may also contract out work for the first time during the freeze.
31. Instead of concentrating on business as before, the Board considers it appropriate to assess the privileges of employees which are frozen under the statute and thereby, delimit the otherwise unrestricted rights of the employer, by focussing on the reasonable expectations of employees. The reasonable expectations approach, in the Board's opinion, responds to both categories of events caught by the freeze, integrates the Board's jurisprudence and provides the appropriate balance between employer's rights and employees' privileges in the context of the legislative provisions.
32. Reasonable expectations language has appeared in a number of decisions dealing with the freeze section. See, for example, *Corporation of the Town of Petrolia*, *supra*; *Scarborough Centenary Hospital*, *supra*; *Oshawa General Hospital*, *York-Finch Hospital*, *supra*; *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795 (Decision omitted from [1979] OLRB Rep. March); *A E S Data Limited* [1979] OLRB Rep. May 368. In the latter case, for example, the Board found that the employer was entitled to re-assign job functions since the employees could not reasonably expect to continue performing their jobs in exactly the same way despite changes in the mode of production and market conditions. Thus, in the Board's view, the reasonable expectations of employees as the appropriate measure of the employees' privileges which are protected by the freeze is a common thread running through the earlier decisions. In the instance case, the Board is expressly articulating the test.
33. *The reasonable expectations approach clearly incorporates the practice of the employer in managing the operation. The standard is an objective one: what would a reasonable*

*employee expect to constitute his or her privileges (or, benefits, to use a term often found in the jurisprudence) in the specific circumstances of that employer. The reasonable expectations test, though, must not be unduly narrow or mechanical given that some types of management decision (e.g., contracting out, workforce reorganization) would not be expected to occur everyday. Thus, where a pattern of contracting out is found, it is sensible to infer that an employee would reasonable [sic] expect such an occurrence during the freeze. The Board in *Simpsons, supra*, although the cleaning was contracted out before the company itself took over that operation, did not conclude there was such a pattern.*

34. The reasonable expectations approach also integrates those cases which affirm the right of the employer to implement programmes during the freeze where such programs have been adopted prior to the freeze and communicated (expressly or implicitly) to the employees prior to the onset of the freeze: *Le Patro d'Ottawa*, [1983] OLRB Rep. Feb. 244. *The Board considers that the upholding of the right to contract out during the freeze period in Corporation of the Town of Petrolia, supra, does not establish an unrestricted right of the employer to contract out work during the freeze but, rather, recognizes that the employer in that case had embarked on a programme leading to the contracting out well in advance of the freeze and that the employees would reasonably have been aware of his programme in the circumstances (see par. 20, in particular).*

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36. The reasonable expectations approach also distinguishes between layoffs and contracting out. Where there was a pattern of contracting out, of course, there would be no violation of section 79 where work was contracted out during the freeze. However, in the Board's opinion, while an employee would reasonable expect a layoff where there was no demand, i.e., where there was an economic downturn, *an employee would not reasonably expect that the work would continue to be performed for the benefit of the employer's operation but through contracting out. This is not to say that the employer does not have the right to contract out work during non-freeze periods, except as limited by a collective agreement. During the freeze, however, and unless there is a practice of contracting out, the employer's right to contract out is limited by the employees' privilege of performing the work if the work is to be performed for the benefit of the employer's operation. Contracting out is merely one of the ways an employer might otherwise increase productivity or efficiency which is caught by the freeze; reducing wages, instituting parking fees, ignoring its policy manual are other means of achieving such goals which are proscribed by the statutory provision.*

[emphasis added]

16. There is no dispute that working conditions were altered. Nine of eleven employees in the bargaining unit had their hours of work substantially reduced for a period of time. There is also no dispute that the applicant did not *expressly* consent to the reduction in hours of work. Can the reduction in hours of work be described as business as usual taking into account the reasonable expectations of the employees?

17. While the employees were aware that the respondent had concerns with respect to productivity, the respondent had not previously contracted out the work. It had implemented a productivity incentive scheme which, unfortunately, was less than successful as a result of the Plant Manager's conduct. The respondent did, as it argues, have the right to reduce hours of work prior to the freeze (and retains that right subject to what is negotiated between the parties in their collective agreement) but the question is whether it can exercise that right during the freeze. It had not exercised it before. There is, in essence, a pattern - a five-day work week. Under what circumstances might a reasonable employee expect that to change?

18. Arguably where there has been a reduction in the amount of available work, a reasonable employee might expect that a layoff would occur even in circumstances where there had been

no layoffs prior to the onset of the freeze (see *Simpsons Limited* [1985] OLRB Rep. Mar. 469 (Springate panel) and the cases cited therein). However in this case, there was no reduction in the amount of available work. Because of its concerns about productivity the respondent chose to have the work done elsewhere and in turn, reduced the hours of work of the employees in the bargaining unit. This falls squarely in our view within the discussion in *Simpsons Limited* (Tacon panel) *supra*.

19. The conclusion that employees would not reasonably expect to have their hours of work reduced during the freeze in response to the respondent's concern about productivity is underlined here by the fact that the same concern was being dealt with by the respondent in negotiations. The respondent in its submissions acknowledged that the issue of productivity was very much tied to its position on wages. Wages was an issue the parties were unable to resolve in their negotiations. Similarly, hours of work is a fundamental issue for bargaining. Whether those negotiations were actually frustrated by the respondent's action in reducing hours of work does not require an answer. Section 79 is a strict liability provision that anticipates and forecloses debate about what may or may not frustrate the conduct of negotiations. The absence of anti-union animus or the existence of *bona fide* business reasons is irrelevant. The freeze preserves the employment relationship until such time as the issues have been successfully negotiated and the parties can then direct their conduct accordingly, or alternately, the issues remain unresolved and the parties make use of the economic tools available to them.

20. We are satisfied that in reducing the hours of work to initially four days per week and subsequently to three days per week, the respondent altered a term or condition of employment in violation of subsection 79(1), subject to the parties' submissions on the issue of consent.

21. The second issue is whether the applicant trade union is estopped from relying on the absence of specific consent. As indicated, at no time did the trade union expressly consent to the reduction in hours of work. The respondent argues that because there is no evidence of anti-union animus on its part and that the issue of productivity was being dealt with openly between the parties, the applicant had a duty to expressly advise the respondent of its lack of consent to the reduction in hours of work. Otherwise the respondent argues, it has been allowed to go out on the proverbial limb in order to have it sawn off.

22. The respondent is asking that we infer consent from the applicant's silence. We are not prepared to do so. Relying on a *lack* of express consent so as to apply an equitable doctrine of estoppel in the face of the statutory language of section 79, is imaginative but ultimately a misapprehension of that language and its purpose. Subsection 79(1) requires consent as a pre-condition for change. The other party is to be put to a decision - "we want to do X - will you consent?" With the advent of the freeze comes a requirement that alterations to "business as usual" can occur only with agreement. More accurately in this case the respondent has chosen to go out on a limb by taking action before it had consent.

23. We note that the trade union, by filing its complaint, indicated in a timely way that it was not consenting to the change. Although both Mr. McGibbon and the respondent were unaware of that complaint on March 27, 1990 when they met, Mr. McGibbon did indicate that the applicant was "looking into filing charges". The respondent implemented the change to three days per week notwithstanding.

24. Consequently, we find that the respondent violated subsection 79(1) of the Act in reducing the hours of work to four days per week on February 19th, 1990 and the further reduction to three days per week on April 2, 1990, until April 30, 1990 when the respondent reverted to a

five-day work week. We hereby order the respondent to pay to employees in the bargaining unit full compensation for wages and seniority lost including benefits and interest.

25. We will remain seized in the event that the parties are unable to resolve any issue of compensation.

2115-89-R Ontario Public Service Employees Union, Applicant v. Canadian Red Cross Society (Toronto Blood Service Centre), Respondent

Bargaining Unit - Certification - Employee - Whether Charge Technologists who are in charge of laboratories exercise managerial functions or are employed in confidential capacity in matters relating to labour relations - Board concluding that duties and responsibilities in nature of coordinating, monitoring and reporting function - Charge Technologists included in bargaining unit

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Rundle* and *P. V. Grasso*.

APPEARANCES: *Christopher Dassios*, *Sherry Currie*, *Ed Ogibowski*, *Renee Naiman*, *Sheila Robinson* for the applicant; *Norman Rogers*, *Hector Martinez* for the respondent.

DECISION OF THE BOARD; February 7, 1991

1. Pursuant to a decision dated December 27, 1989, the Board issued an interim certificate to the applicant for a bargaining unit described as all employees of the respondent in Metropolitan Toronto, save and except *Charge Technologists*, persons above the rank of *Charge Technologist*, scientists, blood donor recruitment staff, and employees in bargaining units for which any trade union held bargaining rights as of November 24, 1989. It is the position of the respondent employer that persons employed in the classification of *Charge Technologist* exercise managerial functions and/or are employed in a confidential capacity in matters relating to labour relations and are therefore to be excluded from the bargaining unit. The applicant trade union disputes this position and asserts that these individuals are eligible for inclusion in the bargaining unit. A Labour Relations Officer was appointed to inquire into and report to the Board concerning the duties and responsibilities of the persons working in the disputed classification.

2. The parties agreed that the evidence of three of the eight persons employed as *Charge Technologists* would be considered representative of the classification. The officer conducted the Board's usual examination allowing the applicant and respondent the opportunity to present evidence. Each of the individuals examined had considerable experience in the position ranging between five and nine years (for a total of some 21 years). A transcript of the examinations was provided to the parties and a hearing before this panel was held to consider the parties' submissions.

3. First of all, the panel is satisfied that the *Charge Technologists* are not employed in a confidential capacity in matters relating to labour relations nor did the respondent actively pursue this argument. In reviewing the transcript, the evidence did not disclose that these individuals have regular and material involvement in matters that would preclude them from participating in collective bargaining pursuant to this aspect of section 1(3)(b).

4. The purpose and approach to the “managerial exclusion” in section 1(3)(b) has generally been described in *Vagden Mills Limited*, [1982] OLRB Rep. June 968 at paras. 5 and following:

5. At common law and in most statutes, managerial personnel are regarded simply as “employees” with the same rights and privileges as other employees. But in the collective bargaining realm, this would create an anomaly. Collective bargaining, by its very nature, requires an arm’s length relationship between the “two sides” whose interests and objectives are often divergent. Managerial employees might find themselves faced with a kind of “conflict of interest” as between their responsibilities as union members. Section 1(3)(b) ensures that neither the union nor the employer and its management team need be concerned about such “divided loyalties” which are potentially corrosive to the interests of both sides. This purpose has been succinctly stated by the British Columbia Relations Board in *Corporation of the District of Burnaby* [1974] 1 Can. LRBR at p. 3....

6. The Ontario *Labour Relations Act* does not contain a definition of the term “managerial functions”, nor are there any statutory criteria to guide the Board in reaching its opinion. The task of developing such criteria has been left to the Board to work out on a case by case basis, in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, and in light of its own developing knowledge and experience in collective bargaining matters. But while the line between “manager” and “employee” is often difficult to draw in particular cases, there is one common theme which pervades all of the cases involving so called “first line” managerial employees or “foreman”: the extent to which the disputed individuals make decisions which significantly affect the economic lives of their fellow employees, thereby raising a potential conflict of interest with them. It was that kind of conflict which section 1(3)(b) was designed to avoid. Thus, in a collective bargaining context, such things as the right to hire, fire, promote, demote, grant wage increases, or discipline other employees should be regarded as manifestations of managerial authority, the exercise of which would be incompatible with participation in trade union activities as an ordinary member of the bargaining unit.

5. As the decision in the *Corporation of the District of Burnaby*, *supra.*, explains:

“The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm’s length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for “cause” or passed over for promotion on the grounds of their “ability”. The employer does not want management’s identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many mem-

bers of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.

6. In assessing whether the Charge Technologists exercise managerial functions, we have been guided in our determination by the comments in *Ottawa General Hospital* [1984] OLRB Rep. Sept. 1199, to which both parties referred:

10. As we have already noted, a perusal of the Board's jurisprudence in the health care sector, and elsewhere, reveals the special significance accorded to the authority to make decisions which impact significantly and adversely on an employee's wages, benefits or job security. It is that kind of decision-making which the Board has always regarded as the exercise of a "managerial function" which justifies an exclusion from collective bargaining on the "conflict of interest" rationale set out above. Indeed, in Ontario, the Board has extended the ambit of section 1(3)(b) beyond the actual or ultimate decision-maker, to those who make what the Board has called "effective recommendations" which materially affect the conditions of employment of those supervised. [See: *McIntyre Porcupine Mines Ltd.*, [1975] OLRB Rep. April 261, and *Inglis Ltd.*, [1976] OLRB Rep. June 270 ... In framing the test in this way, the Board has not ignored the real distinction between a person recommending or influencing a decision, and the one ultimately making it. Supplying information or "input" is not the same as deciding, and a person who does only the former has a much weaker claim when it is suggested that he is exercising "managerial functions". Modern business organizations -especially those employing professionals, - encourage the free flow of information and ideas from subordinates to superiors. Consultation and involvement in the decision-making process, improve communication in both directions, clarify the employer's problems and objectives, improve employee morale, and make optimum use of employee ingenuity or expertise. "Participatory management styles" have become a prevalent technique in large organizations for reducing employee alienation and increasing commitment to the goals of the employer. In small organizations, consultation is inevitable because of the small number of individuals who must work together effectively if the goals of the organization are to be realized. One should not conclude however, that the existence of consultation, or an apparent "democratization" of decision-making, means that real managerial authority has percolated downwards. "Managerial" authority in the sense intended by the statute (i.e. authority of such character that it excludes the individual(s) from the terms of the Act) cannot be substantially diluted, diffused, dispersed, distributed or decentralized throughout an organization, without raising a question about whether these various participants in "collective" decision-making must necessarily all be excluded from the scope of the Act. An employer is entitled to structure his organization as he sees fit, but there is a limit on the extent to which he can unilaterally multiply the number of excluded persons by purportedly creating additional "foremen", or by installing a process of management by committee. *On the other hand there will obviously be situations where individuals make serious recommendations which regularly and significantly impact upon the employment situation or security of fellow employees. If these recommendations, on the evidence, are routinely acted upon to the detriment of those employees, then it can be said that the person making the recommendation is, if not the actual decision-maker, then one decisively influencing that decision and thereby exercising a significant influence over the livelihood or economic destiny of his co-workers. Such influence carries with it the potential for conflict to which section 1(3)(b) is directed. It remains a question of evidence whether an individual's own authority extends this far.*

13. Persons who exercise skills, or perform functions which reflect their own specialized training or responsibilities, will necessarily have a specialized role to play in respect of those with lesser or different training and experience. Frequently, it is only the most experienced, highly trained, or specialized employees who will fully understand the technical requirements of a particular job, and whether it is being done in the safest and most efficient manner. It is part of their job to ensure that appropriate techniques are being applied, and that the work is being done properly. Their expertise and technical judgement are an integral part of the group effort. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a

role to play in co-ordinating and directing the work of other employees - but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining. To adopt so rigid a view would deny thousands of skilled or professional employees the right to engage in collective bargaining, simply because they typically work in semi-autonomous work groups which include a variety of individuals with lower level of skill, education and training or sometimes perform an assigned role as teacher and trainer - a role which inevitably involves some degree of evaluation - rendering a kind of "report card". In a blue collar context "master craftsmen" typically perform such functions in respect of "journeymen", "apprentices" and assorted "helpers". In a university setting, appraisal by professional peers is institutionalized, and it is not at all unusual for "tenure committees" composed of professors and associate professors to determine whether an assistant professor will move to the ranks of those whose job security and income status are much more secure. But this does not mean that these individuals are precluded from engaging in collective bargaining or, for that purpose, should not be treated as "employees" of the university. This is not to deny that professional or technical employees may also exercise "managerial functions" within the meaning of section 1(3)(b). It is simply that *there must be a careful appraisal of the context, and the focus should be upon those powers exercised by the disputed individual which have a significant, direct, and provable impact (positive or negative) upon the terms and conditions of employment of the alleged subordinate employees.* It is that kind of function which raises the "collective bargaining" conflict to which section 1(3)(b) is addressed, and it is this collective bargaining purpose which must be kept in mind when the Board is exercising the broad authority granted to it under section 1(3)(b), and is forming its "opinion" in particular cases.

[emphasis added]

7. The area of work in question comprises essentially the testing, management, and distribution of various blood products. The Charge Technologists report to an Assistant Laboratory Manager and to the Laboratory Manager. Each of the eight Charge Technologists are responsible for the operation of a specific laboratory ("lab") and its function. Within each lab other technologists are employed, all of whom have the same formal training as the Charge Technologists. Lab helpers are employed in three of the eight labs. Two of the labs share one clerk-typist. These latter individuals are currently represented by another trade union. The number of individuals employed in each lab varies considerably. Excluding the Charge Technologists, it ranges from only one other employee to the largest lab which employs approximately 25 individuals.

8. The Charge Technologists are responsible for the work done in each lab. They supervise the work of the employees to ensure that it is properly performed, they are responsible for implementing the respondent's policies, completing various reports and for training. Training is also regularly conducted by Senior Technologists. If necessary, the Charge Technologists will prepare work assignments and determine schedules. The schedules are fairly regular and to the extent that changes have to be made they are done by consensus with the staff or by request to an individual. In those areas which employ lab helpers the Charge Technologist has prepared time sheets on behalf of those staff. The time sheets are forwarded to the Assistant Lab Manager for her approval. When time sheets are prepared for the technologists they are completed by the Assistant Lab Manager.

9. In reviewing the evidence it is apparent that the Charge Technologists have no independent authority with respect to hiring, firing, transfers or discipline. They have participated in hiring interviews, and have provided their views following those interviews. There has not been disagreement between the Charge Technologist and the Lab Manager or Deputy Medical Director or other management individual involved in the interview process. There was, however, apparent recognition that if a consensus was not available the management individual's decision would prevail. At least one of the Charge Technologists has forwarded written offers of employment. These letters are not drafted by the Charge Technologist but are a form letter sent by her upon the instruction of the Lab Manager.

10. Two probationary employees have been let go for failing to attend at work. The Charge Technologist raised their absence with the Lab Manager. No action was undertaken except pursuant to the Lab Manager's instruction.

11. The Charge Technologists complete evaluations of probationary employees and annually of other employees. The evidence does not support the conclusion that these evaluations have affected the employment status of individuals. In any event, the Lab Manager reviews the evaluations and supplies her own comments concerning expected improvement including if necessary, time frames. The Charge Technologists do complete incidents reports. These are not considered to be disciplinary. The Charge Technologists would speak to an employee if they were excessively absent or tardy. None of the individuals has issued a written warning. They do not have the authority to suspend employees. A probationary period cannot be extended without the approval of the Lab Manager. They have no authority to transfer employees or determine lay-offs.

12. The Charge Technologists have no responsibility for establishing rates of pay, nor do they recommend wage increases. They are involved in budget preparation primarily with respect to capital expenditures. They include staffing requests which result from changes in the service's programs or operation (over which they have no authority) and which are subject to higher approval. The Senior Technologists both have access to and participate in the preparation of each lab's budget. Requisitions are approved by the Assistant Lab Manager.

13. The Charge Technologists can grant limited time off, for example, for dental or doctor's appointments and have limited authority to grant overtime. Vacation requests for technologists and leave of absence requests are approved by the Assistant Lab Manager. Vacation requests for members of the other bargaining unit are made to the Charge Technologists and are scheduled giving preference in accordance with seniority. The Charge Technologist has no discretion. If employees are absent due to illness the Assistant Lab Manager is notified.

14. The Charge Technologists do not have access to personnel files. There has been no involvement by the Charge Technologists in the grievance procedure for the existing bargaining unit except on one occasion when Ms. Kruspe was asked by the Lab Manager to provide specifics of a scheduling problem for which she was also able to propose a solution. As a consequence no grievance was pursued.

15. The Charge Technologists are employed on the same basis as other technologists. They receive the same benefits and are paid for overtime work. Each of them does perform some amount of "hands-on" work in addition to their time preparing reports, supervising and co-ordinating, or being involved in other special projects.

16. The Charge Technologists meet weekly with the Lab Manager and Assistant Lab Manager. These are referred to as weekly management meetings. These are not meetings where decisions are made. Rather, it is an opportunity to seek input and to discuss operational requirements and is the time when the Charge Technologists are informed of changes in programming, policy or other matters. Senior Technologists also attend these meetings and participate in the same discussion and receive the same information. The Charge Technologists also have an individual weekly meeting with the Lab Manager where operational concerns are again discussed. At these meetings, the three Charge Technologists indicated that they would discuss individual employee performance with the Lab Manager. There is no clear evidence of the effect of these discussions.

17. The classification of Charge Technologist clearly connotes that the individual is the senior person responsible in that lab. However, the nomenclature is not determinative in assessing whether the individual exercises managerial functions within the meaning of the Act. The wit-

nesses indicated that the job description filed accurately reflected their duties and responsibilities. However, the existence of a job description which appears to provide for the exercise of certain authority is of limited assistance when the evidence, as in this case, does not disclose the actual exercise of that authority.

18. Participating in interviews and the weekly meetings with the Lab Manager are the activities most closely associated with the exercise of managerial functions in this case. However, while we accept that the Charge Technologists' comments and participation are treated seriously by the Lab Manager we are not, on balance, satisfied that the Charge Technologists make "effective recommendations" with respect to matters of a managerial nature. Rather, they perform and provide a professional function and opinion. The range of their duties and responsibilities is distinguishable in this regard from those discussed in *Royal Ottawa Hospital* [1980] OLRB Rep. Apr. 524.

19. It could be argued that the Charge Technologists exercise a greater supervisory authority in relation to the lab helpers and clerical staff. The fact that those employees are in a different bargaining unit would not necessarily preclude a finding that the Charge Technologists exercise managerial functions (see *Grand River Conservation Authority*, [1988] OLRB Rep. Mar. 298). However, on balance we are satisfied that the nature and extent of the Charge Technologists' authority and/or participation does not amount to the exercise of managerial functions. To the extent that the Lab Manager seeks input from the Charge Technologists concerning these individuals' performance, it relates more to the technical and professional supervision that would be expected of someone with greater skill and training.

20. Overall we are persuaded that the duties and responsibilities of the Charge Technologists are in the nature of co-ordinating, monitoring and reporting functions, conduct similar to the role that was described with respect to "Charge Nurses" in *Willows Estate Nursing Home* [1984] OLRB Rep. Dec. 1785 as follows:

4. ... It is the co-ordinating, monitoring and reporting functions of registered nursing staff serving in the capacity of "head" or "charge" nurse which brings them to the periphery of the definition of "employee" under the Act. And about these functions the Board in *Peterborough Civic Hospital*, [1973] OLRB Rep. March 154, had this to say:

11. Head nurses stand at the very boundary between the employee group and management. The head nurse in this particular case is indicative of the role usually played by head nurses. Head nurses form a link or a liaison between management and other employees; they are in charge of a hospital floor and therefore assume many different functions. For example, a head nurse is still involved in patient care. Because of her experience she may be called upon by other nurses prior to consulting the doctor. She may also be required to assist in the orientation of nurses who are new to that particular floor. Neither of these roles is a management function, but is merely the function of the training and experience of head nurses. In addition, the head nurse carries out limited administrative duties. For example, she co-ordinates the policies of the hospital on her floor with respect to staffing. She sees that the scheduling and arranging of personnel is such that there is adequate coverage for patients. This scheduling is carried out in correspondence with a predetermined policy and the head nurse is merely implementing policies decided at a higher level. This implementation should not be confused with the decision-making or control function that goes hand in hand with management.

12. Also, the head nurse forms a conduit between the general staff on her floor and management, or to put it another way she has a reporting function. In this function she is a liaison between management and other employees; she enables management to "keep its ear to the ground" and in touch with the daily operations and functions of the hospital, and at the same time she is a part of the vehicle for management to convey policies and decisions to other employees. Again, this reporting function should

not be confused with the exercise of managerial duties. The duty to manage and the concept of a managerial function requires a corresponding and correlative responsibility. The head nurse in this case does not have that type of responsibility that one envisions as being managerial.

5. ... The responsibility of the charge nurses evidenced here to assign work, train employees and ensure proper coverage of their floor is neither unusual nor "managerial". Nor is the resort to them by the Home for an evaluation of the performance and professional competence of employees working under them during the probationary period of their employment. This reflects no more than the consultative process one would expect with the professional individuals working most closely with these probationary employees. More important would be the ability to make effective recommendations with respect to wage increases, discipline or termination of employees on an ongoing basis, and there is no evidence in the transcript that this is done. ...

21. For these reasons, we find that Charge Technologists do not exercise managerial functions and are not employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Act. Having regard to that finding the bargaining unit is therefore properly described as "all employees of the respondent in Metropolitan Toronto, save and except persons above the rank of Charge Technologist, scientists, blood donor recruitment staff, and employees in bargaining units for which any trade union held bargaining rights as of November 24, 1989".

22. A final certificate will issue to the applicant.

0460-90-R; 0590-90-U United Steelworkers of America, Applicant v. Drillex International of Canada Inc., Respondent v. Ron Martin, Group of Employees; United Steelworkers of America, Complainant v. Drillex International of Canada Inc., Respondent

Certification - Discharge for Union Activity - Petition - Unfair Labour Practice - Evidence of petition's circulation on company premises and time in presence of foremen leading Board to conclude that petitions not voluntary expression of employee wishes - Certificate issuing - Board also finding discharge of vocal union supporter tainted by anti-union animus - Reinstatement with compensation and posting ordered

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Rundle* and *C. McDonald*.

APPEARANCES: *Paula Turtle* and *Roger Aubut* for the applicant/complainant; *B. Pollock*, *Stuart Ducoffe*, *R. Lipic*, *E. Pivdor* and *Vic Skot* for the respondent; *John Desotti*, *Ron Martin* and *Mark Woodliffe* for the Group of Employees.

DECISION OF THE BOARD: February 12, 1991

1. File No. 0460-90-R is an application for certification. File No. 0590-90-U is a section 89 complaint alleging a violation of sections 64, 66 and 70 of the *Labour Relations Act* (the "Act").

2. Pursuant to the panel's decision of December 7, 1990, the applicant was certified to represent a bargaining unit of employees of the respondent. The majority of the panel (with Ms. Rundle reserving her decision) was not satisfied that a petition document filed represented a voluntary

expression of employees' wishes and as such did not cast doubt on the membership evidence filed by the applicant. This decision sets out our reasons for that conclusion and our determination in the section 89 complaint.

3. The approach the Board takes to its inquiry into the voluntariness of any statement of desire filed in opposition to an application for certification was described in *Chatham Concrete Forming* [1986] OLRB Rep. Apr. 426 (and the cases cited therein) as follows:

13. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its documentary evidence of membership. Upon showing the requisite membership support, the union is "certified" or granted a licence to bargain on behalf of a group of employees - subject, of course, to their right to file a timely application terminating bargaining rights. The Board does not solicit *viva voce* opinion about the virtues of trade union representation (see Rule 73(2)), nor, in this jurisdiction, is a representation vote the primary vehicle for achieving the right to represent employees. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as bargaining agent, and to protect employees from possible employer reprisals the anonymity of the union supporters is preserved. That is the way it has been for more than thirty years, ... Representation votes are a residual mechanism resorted to where the union cannot demonstrate a "clear majority" (i.e., more than fifty-five per cent) or where, in the Board's discretion, a representation vote should be held in the particular circumstances of a case. One of those circumstances is a purported change of heart by employees who have previously signed union membership cards.

• • •

16. The Board must be satisfied, however, that when these union supporters sign the petition indicating an apparent change of heart, they are doing so voluntarily, and are not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management. Often, as in the present case, a petition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the change of heart. Was it prompted by a reappraisal of the value of collective bargaining, or by a reluctance to identify oneself as a union supporter when presented with the petition document? While an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. And lest it be thought that the identification of union supporters and opponents is neutral information, one must remember that the Legislature does not regard it that way. Section 111 of the Act is designed to preserve the secrecy of the employees' choice. The Legislature has recognized the employees' concerns and sensitivities. ...

17. Frequently, as in the present case, anti-union petitions are openly circulated on or near the employer's premises, or during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with their employer and may be perceived to be acting on its behalf. In these circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign because of conduct which suggests that continued support for the union will result in the loss of his job or other adverse employment consequences. In neither case can one regard his signing the petition as being truly voluntary - although, of course, the mere identity of interest between the employer and the objecting employees is obviously not sufficient in itself to link the petition with management in the minds of reasonable employees, or undermine the reliability of the signatures placed on it. There must be more than that, and each case must be considered on its own merits. On the other hand, in the Board's experience there are enough instances where employers have committed unfair labour practices, or have sponsored or supported anti-union petitions that these employee fears cannot be discounted as being patently unreasonable. Again, that is why the Act preserves the secrecy of union membership.

18. It is for this reason that the Board undertakes the inquiry contemplated by Rule 73(5) of the

Rules of Practice, in order to satisfy itself from the circumstances of the origination, preparation, and circulation of the petition, that the document truly represents the voluntary wishes of those who signed it. ...

4. Also in *Pigott Motors*, 63 CLLC 16, 264 the Board explained:

• • •

In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its organization, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (*See Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

5. We do not intend to review all of the evidence but provide a summary of our relevant findings. Mr. Ron Martin, a lathe operator employed by the respondent, testified in support of the petition. On May 24, 1990, in the early afternoon, the Form 6, Notice to Employees, was posted in the work place. Mr. Martin read the notice and testified that having spoken with some other employees he decided to start a petition. He and his wife drafted the petition that night at home. On the morning of May 25, 1990, Mr. Martin told his supervisor, Mr. Katsandris that he had personal business to attend to which required an hour off. Mr. Katsandris did not inquire into the nature of that business. Mr. Martin punched out and went to pick up the petition from his wife who had typed it. Mr. Martin returned to Drillex, punched in and went back to work. At approximately 11:55 a.m. Mr. Martin and Mr. Mark Woodliffe, another employee, began circulating the petition. They both punched out in order to show they were not being paid for their time while circulating the petition, but they did not disclose the fact that they had punched out to any of the employees they approached to sign the petition. Mr. Woodliffe became involved that morning when Mr. Martin asked him if he would act as a witness.

6. The two employees went first to the trailer (the "lunch room"). There were a number of employees there. Mr. Martin announced to the group that he had a petition, he read it out to the employees and then proceeded to obtain individual signatures by moving from table to table and passing it amongst the employees. We heard various evidence concerning the order in which Mr. Martin attended the tables. Regardless of that order it is clear that Ryan Lipic, the son of one of the owners of Drillex, and Freeman McDonald were in the lunch room at that time. Moreover it is the uncontradicted evidence of Mr. Longchamps that Mr. Chris Milligan, a foreman with the company, was also present at that time. There is no dispute that foremen are excluded from this bargaining unit. Anyone in the lunch room during this period would have been able to observe other employees signing or not signing the document as it was passed amongst them.

7. From the lunch room, Mr. Martin and Mr. Woodliffe moved to a picnic table located outside and in the vicinity of the entrance doors to the plant. Although there were minor discrepancies in the evidence, essentially the two employees moved from the picnic table to the change room door, then into the change room where more signatures were obtained and then back to the lunch room. They then went back to the picnic table before returning to work at approximately 12:35 p.m.

8. At 1:30 p.m. both employees again punched out. Upon being asked why by Mr. Katsandris, Mr. Martin simply indicated that he had something to do. Mr. Katsandris did not challenge Mr. Martin or inquire any further and allowed him to punch out. The two employees attended outside in order to wait for the arrival of the 2 p.m. shift.

9. Mr. Martin acknowledged that at one point while standing at the entrance door, Mr. Lovelace, a foreman, Ryan Lipic and a Mr. Collard were present at the picnic table. These individuals would be able to observe who signed and who did not sign the document. In addition, Mr. Martin saw Mr. Katsandris come and go during this period. Although he was not certain, Mr. Martin also thought that Mr. Milligan might have been present at the picnic table. Although most of the employees had signed the petition by then, additional signatures were obtained during this period of time. Although Mr. Martin testified that no management individuals were present at any of the locations, it is clear that this was not the case even on his own evidence. Subsequently, Mr. Martin attended at the picnic table where at least Mr. Lovelace and Mr. Ryan Lipic were sitting. Mr. Martin had the petition with him and there is no indication that he attempted to hide that fact from the foreman present.

10. Having witnessed the signatures on the petition, Mr. Woodliffe's involvement ended. Mr. Martin kept the document with him and his wife forwarded it to the Board. There is no issue between the parties with respect to Mrs. Martin's involvement in forwarding the document.

11. Mr. Martin acknowledged that there was no need to "sell" the idea of signing the petition to any of the employees. Rather, during the time they were stationed outside the entrance door, employees were approaching these two employees to sign the petition.

12. It is unusual for employees to punch out during a work day. Mr. Katsandris did not inquire of Mr. Martin the reasons for his request. Mr. Katsandris was aware that a petition was being circulated by Mr. Martin in the work place. Mr. Ferrier, Mr. Woodliffe's supervisor, also did not inquire of Mr. Woodliffe the reasons for his punching out. Both employees, in addition to punching out over lunch, also punched out early that day. The employees were not made aware that Mr. Martin and Mr. Woodliffe were on their own time. Nor in the circumstances do we believe it would have made a difference. A reasonable employee would understand that the document was being circulated on company premises and time and with the tacit, if not active support of management.

13. While the evidence of the actual circulation of the document in the presence of company foremen led us to conclude that it did not represent a voluntary expression of employee wishes, other evidence with respect to the origination of the document provided context to our conclusion.

14. On May 24, 1990, prior to the posting of the Form 6, Notice to Employees, Mr. Freeman McDonald was seen and acknowledges having circulated a document variously referred to as a "survey" or "petition". The applicant initially challenged Mr. McDonald as an individual excluded from the bargaining unit by reason of his managerial functions. It later withdrew that challenge, however, it asserts that Mr. McDonald would be seen as more closely aligned to management.

Regardless of Mr. McDonald's status under the Act, Mr. McDonald did circulate a document amongst the employees on May 24, 1990 for the purposes of obtaining an indication of their wishes with respect to union representation. He was told to stop circulating that document. It is unclear as to who precisely directed Mr. McDonald. The only reasonable conclusion is that it was a member of management following a meeting which occurred during the afternoon of May 24, 1990. That document made reference to the likelihood of continuing employment should the union be successful. We are satisfied that employees were aware that Mr. McDonald had circulated the document, its contents, and that he had been told to stop.

15. Mr. Martin subsequently spoke with Mr. McDonald on more than one occasion prior to commencing the circulation of his petition. He did not attempt to hide these conversations from other employees. He received information about who could and could not sign the petition as between shop leaders and foremen. It is not clear where Mr. McDonald obtained this information. Nor is it apparent that Mr. McDonald was familiar enough with the issues so as to be confident in providing it himself. It is more likely that the information was provided to him at the same time he was told to stop circulating his document.

16. Even Mr. Martin did not believe that it had been appropriate for Mr. McDonald to be circulating the document on May 24, 1990 for two reasons. Firstly, Mr. McDonald was doing it on company time. This supports our earlier conclusion in that Mr. Martin wasn't aware whether Mr. McDonald had punched out or not. He assumed that it was on company time because it was during company working hours. Secondly Mr. McDonald wears a white hat and is a shop leader. While the union withdrew its challenge to Mr. McDonald being on the list of employees, and it is therefore agreed he is a member of the bargaining unit, it would appear that it is members of management, office staff, or guests who wear white hats in the plant and that employees in the bargaining unit would normally wear green hats.

17. On the evidence we were satisfied that an employee would reasonably suspect the involvement of management in the preparation and circulation of the petition and therefore we were not satisfied that the document represented a voluntary expression of employee wishes. We therefore certified the applicant.

II

18. With respect to the section 89 complaint it is the position of the trade union that Mr. Daniel Lapensée was terminated from employment in violation of sections 64, 66(a) and (c), and 70 of the Act. It is the position of the respondent that the termination was for just cause. There is no dispute as to the legal principles which apply in this case. The respondent employer must satisfy the Board on a balance of probabilities that its conduct in terminating Mr. Lapensée's employment was in no way motivated by any anti-union animus.

19. This requirement was summarized in *The Barrie Examiner* [1975] OLRB Rep. Oct. 745 at para. 17 as follows:

17. . . .

In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any

anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

20. The exercise to be undertaken by the panel was described in *Pop Shoppe (Toronto) Limited* [1976] OLRB Rep June 299, at para. 5:

5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278).

21. Daniel Lapensée's employment was terminated on May 10, 1990 by Robert Lipic, part owner of the respondent. That decision by Mr. Lipic came about following an incident involving Mr. Foster and Mr. Lapensée. Mr. Foster was then employed as systems co-ordinator. In that capacity, he had access to all computer records including payroll, customer lists, costings, etc. In early May, 1990, Mr. Foster had tendered his resignation in order to move to a position with another employer. He had known Mr. Lapensée as an employee of the respondent for the period of his employment there, some ten years. On May 9, 1990, Mr. Foster was at the soft drink machine on the respondent's premises when he was approached by Mr. Lapensée in the presence of two other employees, Mr. Collard and Mr. Simoni. There was general conversation surrounding Mr. Foster's upcoming departure. With respect to the evidence of what then occurred at the soft drink machine, we prefer the evidence of Mr. Foster over that of Mr. Lapensée. Mr. Lapensée turned to Mr. Foster at a point and asked him if he could "get us some files". When Mr. Foster responded with an ironic "yeah right", Mr. Simoni referred to Mr. Lapensée as "you fucking dummy". Mr. Lapensée responded with words to the effect of what can they do, fire him, he has already quit. At this point Mr. Foster retrieved a soft drink from the machine, pleasantries were exchanged and he returned to his office.

22. Mr. Foster had a meeting pre-arranged with Mr. Lipic that day at 3 p.m. to discuss matters surrounding his departure. At a point in the meeting Mr. Foster recounted this incident to Mr. Lipic. We are satisfied that Mr. Foster believed Mr. Lapensée's request to be a serious one based on Mr. Lapensée's response to Mr. Simoni.

23. Upon learning of the incident from Mr. Foster, Mr. Lipic pulled Mr. Lapensée's employment record. In September, 1987, Mr. Lapensée was suspended for one day for wilful damage to a tool box. In June of 1988, he was suspended for two days and the letter of suspension confirms that Mr. Lapensée has been counselled on a number of occasions with respect to his attitude and it also advises that if Mr. Lapensée causes any further problems he will be dismissed from employment. Mr. Lipic contacted legal counsel, forwarded the employment record to him and the following morning discussed with counsel whether to terminate Mr. Lapensée's employment. It is the respondent's position that the decision was based on the incident with Mr. Foster coupled with Mr. Lapensée's work record.

24. On May 10, 1990, Mr. Lapensée was called into Mr. Lipic's office. Mr. Lapensée acknowledged that he had asked Mr. Foster to steal files but responded that he had only been joking. Mr. Lipic had already made the decision to terminate Mr. Lapensée's employment and proceeded to do so at that time. Mr. Lapensée was escorted by Mr. Katsandris to his work station, then to his locker to gather his personal belongings and off the premises. The letter of termination

indicates that the respondent's investigation confirms that Mr. Lapensée approached Mr. Foster "with a view to having him 'steal corporate files'".

25. Mr. Lipic was aware that the applicant was conducting an organizing campaign as early as the beginning of February, 1990. The evidence with respect to his understanding of Mr. Lapensée's role in the campaign is less clear. While we heard evidence that Mr. Lapensée was a vocal supporter of the union, Mr. Lipic denied any knowledge of Mr. Lapensée's involvement and denied that he had Mr. Lapensée's union activity at all in mind in deciding to terminate his employment.

26. Mr. Lapensée testified that a meeting occurred between he and Mr. Lipic on March 1st, 1990 in Mr. Lipic's office. He further testified that at that time Mr. Lipic advised him that he had been informed by other employees that Mr. Lapensée was involved in the union and threatened to fire him. Mr. Lipic denies that any meeting occurred in his office and denies that these comments were made. Mr. Lipic does acknowledge that during this period of time he spoke with individual employees, including Mr. Lapensée on the shop floor to "advise" them that the union was engaging in an organizing campaign in the workplace. Mr. Lapensée denied that he was in any way involved. Mr. Lipic also acknowledged that Mr. Lapensée was the last employee that he spoke with.

27. In coming to our conclusions, we have taken the following into account. We heard evidence from other employees who saw Mr. Lapensée going into the office in or around late February or early March which is consistent with Mr. Lapensée's testimony. There was also hearsay evidence from those employees as to what occurred in that meeting upon which we place little if any weight. Filed as an exhibit however was Mr. Lapensée's time card for March 1, 1990. It indicated a code 12, indicating that Mr. Lapensée was in a meeting for the period of time noted. Mr. Lapensée asserts that this was the meeting with Mr. Lipic. Although Mr. Lipic denied such a meeting we received no other explanation for the code or any alternative explanation as to what meeting had taken place.

28. We also heard evidence of a phone call made by Mr. Lapensée to Mr. Lipic concerning a note that Mr. Lapensée found in his lunch box. Mr. Lapensée asserts that the note warned him that Mr. Lipic wanted to "get rid of him". Again, while Mr. Lapensée's own evidence was shaky at best, the evidence that the phone call had been made was corroborated by his wife who was a credible witness and who was not cross-examined on that point.

29. We find it difficult to accept that Mr. Lipic was simply advising employees of an organizing campaign while not also implicitly indicating his own view and seeking information on the subject. Nor are we surprised that employees would deny any involvement in the union to him. Overall, in light of the acknowledgement by Mr. Lipic that he did discuss the union's organizing campaign with employees, and the evidence regarding a meeting with Mr. Lapensée and a phone call, we do not accept Mr. Lipic's statement that he was unaware that Mr. Lapensée was engaged in union activity.

30. In reviewing the incident that triggered Mr. Lipic's decision to terminate Mr. Lapensée's employment in order to determine whether it was free of any anti-union animus, we note the following. While we accept that Mr. Foster believed Mr. Lapensée to be serious in his request the two other employees present did not share that view. In their view, it was essentially a stupid remark on Mr. Lapensée's part but consistent with his reputation in the plant for being somewhat of a joker. If Mr. Lapensée's request were serious, we find it difficult to accept that he would make the request in front of other employees. It was evident that Mr. Lapensée and Mr. Simoni do not

share a good relationship and if serious, Mr. Lapensée was taking a great and unnecessary risk in Mr. Simoni's presence.

31. While Mr. Lipic's stated concern regarding the request for files was based on protecting the company from its competition, he was also aware at that time that the union was organizing in the workplace and it is reasonable to infer that he would have concerns about the union having access to information. Mr. Lipic also did not interview either Mr. Collard or Mr. Simoni at the time but acted solely on Mr. Foster's account. We also note that while Mr. Foster recounted Mr. Lapensée's request as a request to "steal us some files" Mr. Lipic attributes an intention solely to Mr. Lapensée. This decision to terminate is taken in the context of an employee of some ten years service. While Mr. Lapensée's record leaves something to be desired, it had been clean for almost two years prior to this incident. One would have thought that in deciding to discharge such an employee on the basis of such a serious allegation, a full and complete investigation would have been conducted. The fact that Mr. Lipic sought the advice of counsel is inconclusive in the circumstances.

32. While we do not condone Mr. Lapensée's behaviour even as some kind of joke and while much of his own evidence lacked credibility, in reviewing the evidence in total, we are not satisfied that Mr. Lipic's decision was free of any anti-union animus. Having regard to that finding, we declare that the respondent has violated sections 64, 66(a) and (c), and 70 of the Act and hereby order the respondent to reinstate Mr. Lapensée to employment with full compensation for all lost wages, benefits and seniority. We also direct the respondent to post for 60 consecutive days in conspicuous places in the workplace the Notice to Employees attached as Appendix "A" to this decision.

33. The panel will remain seized in the event that the parties are unable to resolve any issue of compensation.

Appendix A
Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE ARE POSTING THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD. AFTER A HEARING IN WHICH THE UNION, THE EMPLOYER, AND A GROUP OF EMPLOYEES PARTICIPATED THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY DISCHARGING MR. DANIEL LAPENSÉE FROM EMPLOYMENT.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

DRILLEX INTERNATIONAL OF CANADA INC.

PER: _____
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 12TH day of FEBRUARY, 19 91 .

1067-88-G; 1068-88-G; 1465-88-JD United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Dufferin Construction Company**, Respondent; United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. The Foundation Company of Canada Limited, Respondent; Labourers' International Union of North America, Local 183, Complainant v. Dufferin Construction Company, a Division of St. Lawrence Cement Inc. and United Brotherhood of Carpenters and Joiners of America, Local 27, Respondents

Construction Industry - Construction Industry Grievance - Evidence - Reconsideration - Board rejecting employer's motion to require union to qualify its witness as an expert in bridge construction - Employer asking Board to reconsider and vary or revoke its ruling - Board ruling that opinion evidence should be admitted where it is relevant and has probative value - Parties to have opportunity to make submissions concerning weight to be given such evidence - Reconsideration application dismissed

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *James Nyman* and *L. Monaco* for United Brotherhood of Carpenters and Joiners of America, Local 27; *A. M. Minsky* and *Roger Quinn* for Labourers' International Union of North America, Local 183; *Bruce W. Binning* for Dufferin Construction Company; *Carl Peterson* for The Foundation Company of Canada Limited; *Carl Peterson* for Airport Development Corporation.

DECISION OF THE BOARD; February 6, 1991

1. These are two referrals of grievances in the construction industry for final and binding arbitration under section 124 of the *Labour Relations Act* and a work assignment complaint made under section 91 of the Act in respect of which an application was made for a determination under section 150 of the Act which provides as follows:

150. The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e).

2. The "work performed or to be performed" is descriptively referred to by the parties as the construction of the departures level bridge at Terminal 3 of Pearson International Airport. The hearings related to the section 150 application commenced in November 1988 and were continuing in October, 1990. In the course of a hearing on October 29, 1990, while James Nyman, counsel for United Brotherhood of Carpenters and Joiners of America, Local 27 ("the Carpenters"), was examining his first witness in the case, Janet Willings, about her qualifications, counsel for The Foundation Company of Canada Limited ("Foundation") moved to have the Board require Nyman to qualify Willings as an expert witness in bridge construction. The Board heard the parties' submissions on whether it should require Nyman to do so. Nyman's submissions included an outline of the type of evidence he intended to adduce through Willings. The Board ruled orally as follows:

The Board has considered the submissions of the parties on the issue of whether [the Carpenters] should be required to qualify Janet Willings as an expert witness in bridge construction. The Board has decided that it is unnecessary to do so. The Board's brief reasons for its decision are the following.

The ultimate question to be decided in these proceedings is whether the work performed in connection with the departures level bridge at Terminal 3 of Pearson International Airport is within the industrial, commercial and institutional ("ICI") sector of the construction industry referred to in clause (e) of section 117 of the *Labour Relations Act*. That question is within the Board's expertise to answer and clause (e) of section 117 requires the answer to be determined by the "work characteristics" of the work in dispute.

In the Board's view, it is neither necessary nor helpful to qualify a witness as expert in any area of evidence going to work characteristics before admitting the evidence of that witness. What does matter to the Board is whether the evidence is relevant to and helpful in deciding the ultimate question of whether the work in issue is work within the ICI sector.

Therefore, the Board will not require Nyman [counsel for the Carpenters] to call further evidence as to witness' qualifications for the purpose of qualifying her as an expert witness before giving any of the testimony which he has summarized for the Board as long as the Board is satisfied that the testimony is relevant to the matter before it and has probative value.

3. By letter dated November 13, 1990, from Foundation counsel, the Board has been asked to exercise its discretion under subsection 106(1) of the Act and reconsider and vary or revoke its ruling. Counsel for Dufferin Construction Company ("Dufferin") and for Labourers' International Union of North America, Local 183 ("the Labourers") support the application and adopt Foundation counsel's submissions. Nyman responded to the request for the Carpenters by letter dated December 5, 1990. The parties mere content to have the Board decide the request on the basis of their written submissions. The request concludes as follows:

In making our request for consideration herein, we rely on *John Entwistle Construction Limited*, [1979] O.L.R.B. Rep. 1096, since our request raises a "significant and important issue of Board policy" which requires the Board to determine if it should vary or revoke its evidentiary ruling of October 29, 1990. It is submitted that as a matter of policy the Board ought to exclude opinion evidence unless the witness qualifies an [sic] expert within the meaning of the jurisprudence in this area.

Accordingly, for the foregoing reasons, we request the Board to reconsider its Decision and require Carpenters' Union, Local 27 to establish Ms. Willings' qualifications as an expert before she is or continues to be entitled to give opinion evidence concerning bridge construction, including the work characteristics of bridge construction as compared to other structures. In default of a finding by the Board that she is such expert, we request that the Board strike those portions of her testimony which constitute opinion evidence from the record and order and direct that she not be entitled to give any further opinion evidence in this matter.

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4. The Board's Practice Note No. 17 dealing with applications for reconsideration referred as follows to the *Entwistle decision* cited in the request.

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5. The Board also stated in *John Entwistle Construction Limited*, [1979] O.L.R.B. Rep. Nov. 1096 at ¶15:

"The Board exercises its jurisdiction under section 95(1) [as it then was] of the Act to reconsider and vary or revoke any decision with care and caution in order not to undermine the finality of its decisions and, as stated by the Board in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:

"Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make repre-

sentations or objections not already considered by the Board that he had no opportunity to raise previously."

These are general standards which the Board has developed as guidelines and which are useful not just to guide the Board in making its decisions, but also to allow parties who may be affected by the Board's decisions some degree of certainty of what to expect from the Board. While it is important for the purpose of certainty that these standards generally be adhered to, it is equally important that they not be followed inflexibly. Although neither of the two conditions precedent stated in the *Canadian Union of General Employees* case, *supra*, are satisfied here, the request does raise significant and important issues of Board policy and for this reason the Board will review its decision to determine if it should vary or revoke the decision."

The Board may reconsider and vary or revoke any decision, order, direction, declarations or ruling pursuant to subsection 106(1) which reads as follows:

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

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5. Counsel for Foundation, Dufferin and the Labourers submit that the Board erred in law when it refused to require that Willings be qualified as an expert witness before giving "opinion" evidence. In support of their position they rely substantially on the common law relating to the admissibility of opinion evidence and not on any Board jurisprudence. The Board is prepared to acknowledge, for the purposes of this decision, that the case law relied upon by those parties may reflect accurately what the courts require for evidence to be admissible in the courts. The Board, however, has the express power under subsection 103(2)(c) of the Act "to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not". Those are terms which accommodate proceedings before a specialized administrative tribunal, as the Board is, and they include the power to admit hearsay evidence. Thus, to the extent that opinion evidence of a witness unqualified as an expert in the matter is in the nature of hearsay, the Board has a statutorily conferred power to admit it.

6. The Board's power to admit hearsay evidence overrides the common law limitations on admitting it and that power has been affirmed by the courts, both respecting subsection 103(2)(c) and the similarly worded subsection 44(8)(c). The judgements of the courts in that respect were canvassed by the *Board in Reimer Overhead Doors Ltd.*, [1984] OLRB Rep. Oct. 1493 at paragraphs 12 through 17. One of the judgements canvassed was that of the Ontario Court of Appeal in *R. v. Barber et al.*, [1968] 2 O.R. 245. At 252 the court recognized the extent to which the power given by the Legislature to an arbitrator under subsection 44(8)(c) overrides the common law:

By that clause the Legislature recognized that arbitrations will frequently be presented before arbitration boards by lay persons. Accordingly, it relaxed the strict rules as to the admissibility of evidence and in particular allowed hearsay evidence to be adduced without objection.

The Court added the qualification that "that provision does not relieve a board from acting only on evidence having cogency in law". This caution was interpreted by the Ontario Court of Appeal in *Noranda Metal Industries Limited, Fergus Division v. Local Union 2345, IBEW et al.*, [1984] CLLC ¶14,024, at 12,098:

Obviously, if evidence is irrelevant, it cannot be relied upon even although it has been admitted.

I think that is all that Jessup J.A. meant in stating that the provision of the *Labour Relations Act* referred to by him "does not relieve a board from acting only on evidence having cogency in law". It is apparent that the present section 44(8)(c) is intended to permit an arbitrator to rely on relevant evidence even where such evidence is not admissible in a court of law.

7. Since the Board's power under section 103(2)(c) of the Act to admit evidence is the same as that of an arbitrator under section 44(8)(c), the Court of Appeal clearly seems to have said that the Board may admit and rely on hearsay where it is relevant to what the Board must determine. Thus, it would appear that the Court has equated relevance with admissibility. In that respect, Foundation counsel appears to be challenging that equation when he contends, in the application for reconsideration, that "...the Board confused relevancy of evidence with admissibility of evidence and thereby erred in law in failing to require [the Carpenters] to qualify [Willings] as an expert before giving opinion evidence." In the Board's opinion, its ruling that it would admit Willings' testimony as long as it is relevant to the matters before the Board and has probative value satisfies the equation. Beyond that, should any of Willings' evidence be hearsay, the parties will have the opportunity in final argument to instruct the Board on the weight to be given to that evidence. As the Board observed in *Reimer, supra*, at paragraph 10: "...[t]he Board has regularly admitted hearsay evidence and has then addressed the issue of the weight to be given, if any, to such evidence."

8. Therefore, in the circumstances in which the Board made its ruling not to require counsel for the Carpenters to qualify Janet Willings as an expert witness in bridge construction and for all of the above reasons, the Board declines to reconsider and vary or revoke the ruling. Furthermore, for the same reasons, insofar as the request is grounded in the submission that, as a matter of policy, the Board ought to exclude unqualified opinion evidence, the Board is *not* satisfied that the request establishes the need for such a policy. Whether to admit such evidence is for the Board to decide in the particular circumstances before it. For example, the Board might want to qualify as expert in a particular field of medical practice a witness giving medical evidence about another witness' competence and compellability. In the view of this Board panel, however, it would unduly limit the Board's exercise of its subsection 103(2)(c) powers to adopt a policy of excluding all opinion evidence unless the witness is qualified as expert within the meaning of the common law jurisprudence relied on by counsel in making this application.

9. In the result, the application for reconsideration of the Board's ruling not to require counsel for the Carpenters to qualify Janet Willings as an expert in bridge construction is dismissed.

2350-89-JD; 1164-89-G Millwright District Council of Ontario on its own behalf and on behalf of Local 1151, Complainant v. International Brotherhood of Electrical Workers, Local 402, and **E. S. Fox Limited**, Respondents; International Brotherhood of Electrical Workers Local 402, Applicant v. E.S. Fox Limited, Respondent v. Millwrights District Council on its own behalf and on behalf of its Local 1151, Intervener

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - IBEW grieving assignment of work to Millwrights - Millwrights making jurisdictional dispute application - Board dismissing grievance on ground that collective agreement providing that such work assignment disputes may not be the subject of a grievance - Board dismissing jurisdictional dispute application on ground that collective agreement requires work claim disputes to be referred to Plan for Settlement of Jurisdictional Disputes in the Construction Industry

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *N. L. Jesin* and *G. Millard* for Millwright District Council of Ontario on its own behalf and on behalf of Local 1151; *W. Dubinsky* and *D. Edwards* for International Brotherhood of Electrical Workers Local 402; *W. J. McNaughton* for E. S. Fox Limited.

DECISION OF THE BOARD; February 15, 1991

1. The Board has before it two related matters. 2350-89-JD is a jurisdictional dispute filed under section 91 of the *Labour Relations Act* by the Millwright District Council of Ontario on its own behalf and on behalf of its Local 1151 ("Millwrights").

2. File 1164-89-G is a section 124 grievance filed by the International Brotherhood of Electrical Workers, Local 402 ("IBEW") against E.S. Fox Limited ("E.S. Fox") alleging the following:

On the 1st, 2nd and 3rd days of July, 1989 you permitted persons who were not members of this Union to do the work of lining motors, installing of sheaves on the electrical motors, installing of belts and tensions and installing of motor bases on the project of Boise Cascade at Fort Frances. As we pointed out to you, this is a violation of Articles 200, 202 and 505 of the Collective Agreement, together with the understandings reached between the Union and you.

3. The Millwrights intervened in the section 124 grievance stating:

"It is submitted that this matter represents a jurisdictional dispute and ought not to be determined through the grievance procedure".

4. In its reply to the grievance E.S. Fox made the following submission:

The work in dispute was assigned to the Millwright & Machine Erectors, Local Union 1151 in accordance with the local practice, employer's preference and customer's preference.

5. By letter dated November 23, 1989 counsel for the IBEW advised counsel for the Millwrights with copy to the Registrar of the Ontario Labour Relations Board as follows:

Pursuant to the information supplied to us by Frank Reilly, Labour Relations Officer, we are prepared to withhold any further insistence that this matter proceed forthwith to permit you to file a jurisdictional disputes application.

6. These matters were scheduled for hearing by the Board, differently constituted, by decision dated March 27, 1990. Paragraph 1 of that decision stated:

After considering the representations of the parties, the Board adjourns the pre-hearing conference. This complaint under section 91 will be listed for hearing together with the referral under section 124 in Board File No. 1164-89-G, so that the Board may consider the objections to the jurisdiction of the Board in this complaint and the effect of such objections to the referral in Board File No. 1164-89-G.

7. The IBEW, in paragraph 2 of Schedule A of its reply to the jurisdictional dispute application dated January 7, 1990, stated: "At the meeting (mark-up meeting) the drawings of the project were reviewed and the work in dispute was assigned to the millwrights."

8. At the hearing counsel for the IBEW took the position that the Board is deprived of jurisdiction to hear the jurisdictional dispute pursuant to section 91(14) of the Act, Article 509 of the IBEW Agreement and Article 14(d) of the Millwright Agreement. Counsel submits the section 124 grievance should proceed on its merits and that the Millwrights have no standing to intervene in the section 124 grievance filed by IBEW against E.S. Fox.

9. Counsel for E.S. Fox submits that the work was done by members of another trade union and pursuant to Article 509 of the IBEW Agreement such a dispute "...shall not be the subject of a grievance...". E.S. Fox contends that pursuant to section 91(14) the Board does not have jurisdiction to hear the section 91 complaint and therefore both matters should be dismissed.

10. Counsel for the Millwrights took the position that the Board does not have jurisdiction to hear the section 124 grievance. Counsel submits the IBEW agreement contains a clause providing that a grievance over a work assignment dispute cannot be heard as a grievance and therefore the section 124 grievance should be dismissed.

11. E.S. Fox is bound to collective agreements with the IBEW and the Millwrights. Article 509 of the IBEW agreement provides as follows:

509 JURISDICTIONAL DISPUTES (STIPULATED)

When a work claim dispute arises between the Union which is a party to this agreement and any other Union, person or organization which cannot be settled to the satisfaction of all parties concerned, *such a dispute shall not be the subject of a grievance under this agreement*, or the OLRA, but shall, without any stoppage of work or interference with the progress of the job, be processed in accordance with the Plan for Settlement of Jurisdictional Disputes in the Construction Industry or to any similarly structured board, which may be established if the said plan is not available to the parties.

In the meantime, work will continue as assigned by the employer until otherwise changed by decision of the Joint Board or the Ontario Labour Relations Board.

[emphasis added]

12. Article 14 of the Millwrights Agreement provides:

(a) The Party of the First Part agrees to recognize the jurisdictional claims of the United Brotherhood of Carpenters and Joiners of America as contained in Schedule "C" attached to and forming an integral part of this Agreement.

(b) If a Jurisdictional Dispute arises on any job between the Party of the Second Part and any other Building Trades Union that is affiliated with the AFL-CIO Building and Construction Trades Department, same shall be settled by submitting the dispute immediately to the Impar-

tial Jurisdictional Disputes Board for a decision. The decision rendered by the Impartial Jurisdictional Disputes Board shall be recognized and immediately implemented and such decision shall be binding on all Parties to the dispute.

(c) Both parties agree to recognize and abide by all agreements covering work jurisdiction as made and entered into by and between the International body of the United Brotherhood of Carpenters and Joiners of America, and any other International Union affiliated with the AFL-CIO.

(d) Any jurisdictional dispute between the Union and any other Building and Construction Trades Union, that involves any work undertaken by an employer will in no way interfere with the progress of the work. The Parties agree to abide by a decision of the Impartial Jurisdictional Disputes Board for that project.

(e) The Employer shall be kept fully advised of all jurisdictional disputes the Council may have with his sub-Contractor on the job.

(f) On request of either party to this Agreement, a Pre-Job Conference may be held to view the work to be performed and ascertain work assignments to be made in connection therewith. (SEE LETTER OF INTENT WITH RESPECT TO THIS ARTICLE LISTED IN SCHEDULE "F" OF THIS AGREEMENT).

Letter of Intent states as follows:

Article Fourteen - Jurisdictional Panel

If a Jurisdictional Panel is established for the Province of Ontario, prior to the termination of this Agreement, the Association of Millwrighting Contractors of Ontario Inc. and the Millwright District Council of Ontario, hereby agree to meet for the purpose of investigating the implementing of this Disputes Panel as part of this Collective Agreement.

13. We are satisfied on the basis of the submissions of the parties and the documentation filed with the Board that the events that gave rise to the grievance are the same events that are subject of the jurisdictional dispute. The very wording of Article 509 contemplates precisely the circumstances that brought the parties to the Board. The work is assigned to and performed by persons of one trade union rather than persons in another trade union. The trade union whose members did not get the work, namely the IBEW filed a grievance. The language in Article 509 is clear, this type of work dispute "shall not be the subject of a grievance under this agreement, or the OLRA, but shall without any stoppage of work or interference with the progress of the job, be processed in accordance with the Plan for Settlement of Jurisdictional Disputes in the Construction Industry or to any similarly structured board, which may be established if the said plan is not available to the parties."

14. Having regard to the above the section 124 grievance is hereby dismissed.

15. This brings us to the question of the Board's jurisdiction under section 91(14). Section 91(14) of the Act provides:

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(14) The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal.

...

16. The Board has stated in a number of Board decisions that the Board does not have jurisdiction when the parties have provisions in their collective agreements requiring work assignment disputes to be referred to a mutually selected tribunal. E.S. Fox, the Millwrights and the IBEW are bound by collective agreement provisions that require the parties to refer any work claim disputes to the Plan for Settlement of Jurisdictional Disputes in the Construction Industry.

17. Having regard to the above the Board finds it does not have jurisdiction under section 91(14) to hear this complaint and it is therefore dismissed.

18. At the outset the Millwrights raised an issue with respect to Board Member Kobryn sitting on a matter involving the Millwrights on the basis of reasonable apprehension of bias due to the fact that he has been subpoenaed by the Ironworkers union to testify in another proceeding involving the Millwrights. At the time of the hearing and as of the issuance of this decision, Board Member Kobryn has not been called to testify. This issue is premature and we do not intend to deal with it.

3227-88-JD United Brotherhood of Carpenters and Joiners of America, Local 2222, Complainant v. Electrical Power Systems Construction Association, Ontario Hydro, Ontario Sheet Metal Workers' Conference on its own behalf and on behalf of Local 473, Respondents

Construction Industry - Jurisdictional Dispute - Dispute involving installation of sheet metal siding and metal cap screws to fasten sheet metal to temporary change facility at Bruce Nuclear Power Development - Board approving employer conclusion that area practice outweighing employer past practice - Board directing that work continue to be assigned to sheet metal workers - Direction restricted to project and Board declining to make direction provincial in scope

BEFORE: R. A. Furness, Vice-Chair, and Board Members C. A. Ballentine and W. N. Fraser.

APPEARANCES: David A. McKee, Bryon Black and John Marchildon for the complainant; C. C. White, Steven L. Moate, Sheila Goldsworthy and David T. McKee for Electrical Power Systems Construction Association and Ontario Hydro; S.B.D. Wahl, Robert Brown and George Ward for Ontario Sheet Metal Workers' Conference on its own behalf and on behalf of Local 473.

DECISION OF THE BOARD; February 18, 1991

1. The complainant has filed a complaint under section 91 of the *Labour Relations Act* and has requested that the Board issue a direction under section 91 with respect to the assignment of certain work.

2. In a decision dated June 1, 1990, the Board stated, in part as follows:

For reasons to be given in writing, the Board makes the following direction pursuant to the provisions of section 91 of the *Labour Relations Act*:

Ontario Hydro shall assign to members of Sheet Metal Workers' International Asso-

ciation, Local 473, the installation of external sheet metal siding (Vic West 5000 Series); the installation of interior sheet metal siding (Vic West 5000 Series L800); and the installation of metal cap screws to fasten such sheet metal to the temporary change facility at Bruce Nuclear Power Development.

3. The Board now sets forth the reasons for its decision dated June 1, 1990.

4. In *Anchor Shoring Limited*, [1974] OLRB Rep. Aug. 528, the Board at page 531 listed the criteria which may be used in a jurisdictional dispute as collective bargaining relationships, skills and training, economic considerations, employer's practice and area practice. There is no dispute that the complainant and Ontario Sheet Metal Workers' Conference on its own behalf and on behalf of Local 473 (the "sheet metal workers") are bound by separate collective agreements with Ontario Hydro. The complainant and the sheet metal workers possess the skills and training with respect to the work in dispute. There was nothing before the Board with respect to economic considerations. The parties were apparently of the view that the resolution of this jurisdictional dispute depended upon the criteria of practice. There was no real dispute as to the practice of Ontario Hydro on the area practice. There were clearly great differences among the parties concerning the interpretation to be given to the circumstances surrounding such practices.

5. In the course of their arguments the parties referred to the length of the respective collective bargaining relationships, job mark-up meetings, recent decisions of this Board, temporary buildings versus permanent buildings, the amount of work involved, the alleged acquiescence by the sheet metal workers to the work being performed by members of the complainant and the conduct of certain employees of Ontario Hydro.

6. The complainant and Ontario Hydro have been covered by a series of collective agreements for some twenty-five years. These collective agreements have been between the Electrical Power Systems Construction Association ("EPSCA") and the Ontario Allied Construction Trades Council (the "Council"). The sheet metal workers were not covered by these series of collective agreements. Until as recently as the end of 1982 Ontario Hydro and the sheet metal workers were not covered by a collective agreement. In that year Ontario Hydro and the sheet metal workers became bound by a collective agreement between EPSCA and the Ontario Sheet Metal Workers' Conference for Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562. However, it was not until 1985 that Ontario Hydro directly hired sheet metal workers.

7. The sheet metal workers did not initially attend the pre-job mark-up meetings at the Bruce Nuclear Power Development (the "project"). However, in 1987, the Ontario Sheet Metal Workers Conference referred a grievance to the Board under the provisions of section 124 of the *Labour Relations Act* with Ontario Hydro and EPSCA named as the respondents. In *Ontario Hydro, Electrical Power Systems Construction Association*, Board File No. 2405-86-M, unreported decision dated September 12, 1987, the Board was required to interpret Article 8.2 of the collective agreement between EPSCA and the Conference. Article 8.2 provided as follows:

8.2 Regular mark-up meetings will be conducted for each project and for transmission and transformation construction at times appropriate for the work in progress. The purpose of these mark-up meetings is to indicate to the Unions the work which is about to be carried out by the Employers in order to minimize the potential for jurisdictional disputes.

EPSCA will provide written notice to the Union as far in advance as possible of mark-up meetings.

The Union will attend these mark-up meetings, and every effort will be made to settle

questions of jurisdiction before the dates that management indicates the work is expected to commence.

In the grievance the Board was asked to determine whether Ontario Hydro and EPSCA has violated the collective agreement by not holding a mark-up meeting with respect to the flashing on a hanger storage building. The Board found that at the end of 1982 some of the work normally handled by members of the sheet metal workers was being performed by employees represented by other trade unions. Upon the Conference obtaining bargaining rights certain informal adjustments were made over a period of time in which the Conference's members were assigned some of the work previously performed by members of other trade unions. The issue before the Board in that case was whether the failure to hold mark-up meeting with respect to the flashing on the hanger building constituted a violation of Article 8.2. It was the position of Ontario Hydro and EPSCA that mark-up meetings were only required when the work in question both had not been previously assigned and was likely to be the subject of competing jurisdictional claims. The Board concluded that there had indeed been a violation of Article 8.2 in failing to hold a mark-up meeting.

8. The effect of the decision of the Board in *Ontario Hydro, Electrical Power Systems Construction Association, supra*, appeared to cause Ontario Hydro to review the way it considered the jurisdictional claims of the Conference with respect to work which had been assigned at mark-up meetings before the Conference became a party to a collective agreement with Ontario and EPSCA. In a letter to EPSCA's representatives dated October 2, 1987, EPSCA's grievance officer S. Goldsworthy stated:

Roof Flashing Arbitration
Darlington GS
Board File #2405-86-M

Please find enclosed an arbitration in the above-noted matter.

The Sheet Metal union grieved regarding the failure to hold a mark-up meeting for roof flashing on a hanger storage building at Darlington. Management contended that since the work had been performed previously by the Carpenters, a mark-up meeting would have had a predetermined outcome, that being the work would be assigned to and performed by the Carpenters.

The Board concluded that because the work was originally performed by the Carpenters prior to the Sheet Metal Union having an agreement with EPSCA, and because no mark-up meeting was held for this work, the Sheet Metal Union had no opportunity to present their case in the manner contemplated by the Work Assignment article. Management was thus found to be in violation of Article 8.2 by failing to hold a mark-up meeting.

The Board did not believe there was a mutual acceptance of Ontario Hydro's interpretation and that the commitment to hold a mark-up meeting could be bypassed by virtue of clear-cut past practice *in view of the fact one participant had no opportunity to claim the work assigned previously.* (original emphasis)

In future, if a particular union has not had an opportunity to claim work a mark-up meeting must be held for the work. Practically, this would apply to the Sheet Metal Union, because of the absence of an agreement with them prior to 1982.

The issue of damages was not addressed as the applicant although aware of it, did not address the problem for years.

If you have any questions about the decision, feel free to call me.

It was the evidence of Thomas Williams, Ontario Hydro's field manager at the project that, as a result of the decision in *Ontario Hydro, Electrical Power Systems Construction Association, supra*, and other decisions of the Board which required Ontario Hydro to mark-up its work, he looked

from Goderich to Owen Sound for area practice. He explained that his decision that the work ought to be assigned to sheet metal workers was based upon decisions of the Board, the fact that sheet metal workers had not been covered by a collective agreement until 1982 and to the fact that there had not been direct hires of sheet metal workers until 1985. He informed the board that he had considered four criteria namely, decisions of record, international agreements, area practice and employer past practice. Mr. Williams concluded that the first two criteria were of no assistance to Ontario Hydro in making an assignment. In his view it came down to the third and fourth criteria.

9. Mr. Williams concluded that the great majority of sheet metal siding performed in the geographic area had been installed at the project and that 99.9% of the sheet metal siding had been installed by contractors and sub-contractors. The members of the complainant were assigned a very small amount of installation of sheet metal siding on the basis of field assignments. Nevertheless, the complainant sought to make a distinction between sheet metal siding which was installed on permanent buildings as opposed to temporary buildings (sometimes expressed as capital buildings as opposed to non-capital buildings) and pointed to and claimed sheet metal siding installed on temporary structures. The position of the complainant on this claim has to be considered in the light of the fact that such assignments were typically made on the basis of field assignments. Such field assignments were made by foremen without mark-up meetings. Moreover, the practice of Ontario Hydro has to be looked at in the light of the reality that Ontario Hydro did not have sheet metal workers as employees on the site to dispute assignments or to challenge the distinction between permanent buildings as opposed to temporary buildings.

10. Mr. Williams concluded that area practice outweighed employer past practice. He was aware that 99.9% of sheet metal siding and roofing had been performed by sheet metal workers and that only a minuscule portion of such sheet metal siding and roofing had been put on by Ontario Hydro. Faced with the clear preponderance of the third criteria over the fourth criteria, Mr. Williams made the assignment of the work to sheet metal workers.

11. In our view, the approach by Mr. Williams and Ontario Hydro was logical and fair and the assignment which was made in favour of members of Sheet Metal Workers' International Association, Local 473 was correct.

12. The Conference requested the Board to make any direction provincial in scope. This request was opposed by the other parties. The Board does have the jurisdiction to expand the geographic scope of its directions by virtue of section 91(2) of the *Labour Relations Act*. The Board has declined to make the direction provincial in scope. The complaint before the Board was heard on the basis of work performed at the project and not on the basis of work performed throughout Ontario. In these circumstances, the direction is of necessity to be restricted to the project.

0710-89-R Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880, Applicant v. Ford Motor Company of Canada, Limited, Respondent v. Group of Employees, Objectors

Certification - Employee - Practice and Procedure - Labour Relations Officer inquiring into duties and responsibilities of disputed individuals - Officer's Report including transcript of evidence running hundreds of pages - Parties requesting oral hearing in order to make representations about conclusions that Board should draw from the material - Board agreeing to schedule oral hearing but first directing parties to file complete statement of fact and law together with transcript and case references

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

DECISION OF THE BOARD; February 27, 1991

1. The name of the respondent is amended to read: "Ford Motor Company of Canada, Limited".

2. This is an application for certification in which the union seeks to represent a bargaining unit consisting of "all non-management supervisors". The respondent replies that these individuals are not "employees" within the meaning of the *Labour Relations Act*. The respondent relies upon section 1(3)(b) of the Act which reads as follows:

1.-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

...

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

3. In accordance with its usual practice, the Board appointed a Labour Relations Officer to inquire into and report to the Board upon the duties and responsibilities of the disputed individuals. The Officer's "Report" includes a transcript of the evidence of a number of witnesses, together with related exhibits. The transcript runs for hundreds of pages and is supplemented by additional documentary evidence. Not surprisingly, both parties have requested an oral hearing in order to make representations about the legal and factual conclusions that the Board should draw from this material. In a letter to the Board dated December 7, 1990, counsel for the union included this submission:

At the outset we submit that a hearing before the Board in connection with the Report is necessary in the circumstances given the voluminous nature of the transcripts and the significance of the evidentiary subtleties to our argument. The examinations in this matter extended over a considerable period of time and were extensive in scope and duration (as is evident by the length of the transcripts and exhibits). As a result, it will be necessary to offer full argument before the Board on the issue of the conclusions the Board should reach in view of the Report. We anticipate that legal argument will be lengthy and extensive. Further, it will be necessary to make extensive reference to the relevant evidence presented through the examinations and it is our view that such can more fully and effectively be achieved through oral argument before the Board rather than written submissions.

Accordingly, we request a hearing before the Board to make representations in this matter. In light of this request, we have not made reference to the evidence on which we intend to rely

except to the extent that such is briefly dealt with in the context of our outline of summary of our position. Similarly we have not attempted to present our legal argument or set out authorities upon which we rely, but rather, have provided herein a summary of the position we intend to argue before the Board.

4. We agree with counsel's impression of the evidence and the necessity for a formal hearing; however, we think the circumstances of this case demand more formal written representations than those typically required in simpler cases. In particular, we think it would be useful to the Board to have a detailed summary of the factual conclusions which the parties urge the Board to draw from the evidence, together with references to the specific testimony which, it is said, supports those conclusions. Likewise, we think it would be very useful to have a full statement of legal submissions, including reference to those cases (or passages therefrom) which the parties submit support their legal positions. With the parties' positions thus clearly identified, the Board would be in a better position to consider and respond to their representations at the hearing. For example, the Board will want to hear from the parties about the applicability (or not) of the principles enunciated in such cases as: *Chrysler Canada Ltd.*, [1976] OLRB Rep. Aug. 396, or *Etobicoke Hydro Electric Commission*, [1981] OLRB Rep. Jan. 38. These are but two of the many cases in which the Board has considered whether the functions of alleged "supervisors" are such that they are not "employees" entitled to engage in collective bargaining under the *Labour Relations Act*. Obviously, this is a mixed question of fact and law with strong labour relations policy content; moreover, it is not without significance that the situation in *Chrysler* appears to be at least superficially similar to the one before us in the instant case.

5. Having regard to the foregoing, and pursuant to section 102(13) of the Act, the Board hereby directs all parties, including the CAW, intervener, to file with the Board a complete statement of fact and law, together with transcript references supporting its factual submissions, and case references, supporting the legal principles which, it is said, should be applied to those facts. We mention the CAW specifically because it has not as yet taken a position even though it appears to have a collective agreement with the respondent purporting to cover its "employees". (As to the relationship between employment status under the Act and the scope of a collective agreement see: *Northern Telecom*, [1983] OLRB Rep. Jan. 95.)

6. Upon receipt of this material (the Board has already received a factual submission from the respondent), the Board will schedule an oral hearing to consider the parties' further representations.

0502-89-U William Spencer Green, Complainant v. CAW Local 195 & Fabricated Steel, Respondents

Duty of Fair Representation - Unfair Labour Practice - Union settling discharge grievance and securing reinstatement on strict terms - Settlement signed by grievor - Grievor subsequently failing to meet strict terms and discharged by employer - Union filing new grievance but subsequently withdrawing it in return for employer's agreement to indicate "quit" rather than "discharge" on separation papers - Board finding union's approach reasonable in circumstances - Complaint dismissed

BEFORE: *Nimal V. Dissanayake*, Vice-Chair.

APPEARANCES: *Angus R. MacMillan* for the complainant; *L. N. Gottheil*, *Paul Dubruiel*, *Ernie Fryer* and *Cam Clark* for the respondent C.A.W. Local 195; *Patrick F. Milloy* and *Douglas R. Hewitt* for the respondent Fabricated Steel.

DECISION OF THE BOARD; February 18, 1991

1. The complainant, William Spencer Green, has filed a complaint under section 89 of the *Labour Relations Act*, alleging that the respondent union has dealt with him contrary to the provisions of section 68 of the Act. That section reads:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. While initially the complainant raised a number of allegations as a basis for the alleged violation of section 68, in his final submissions, counsel for the complainant relied solely on the circumstances surrounding the entering into by the union into a contract settlement agreement and Mr. Green's subsequent discharge under the terms of that agreement. Therefore, this decision will only deal with that aspect of the complaint. In any event, the Board notes that the evidence relating to those other matters, namely Mr. Green's harassment grievance and the allegations against Mr. Cam Clarke, union officer, did not establish any basis whatsoever to ground a finding of a violation of section 68.

3. Mr. Green commenced employment with the intervener employer in March 1986 as a press operator. The evidence is that he had a poor attendance record in 1987, mainly due to accidental injuries at work. On May 2, 1987, he was called into a meeting with management and union representatives at which his attendance record was reviewed. As a result of the meeting, Mr. Green entered into an agreement that he "will not miss any time for the next three months from May 3, 1987 to July 3, 1987". I am satisfied that as a result of this meeting, Mr. Green became fully aware that the employer had serious concerns about his poor attendance. The evidence indicates that he did not live up to his promise. Thus on June 8, 1987, he received a written warning for "excessive work disruptions".

4. The next material evidence relates to the week commencing January 9, 1988. Mr. Green worked on Monday and Tuesday (January 9 and 10) and also completed his shift on Wednesday January 11, 1988. He wore no bandage on his hand on any of those days and did not complain to anyone of any discomfort or disability. On the next day January 12th he took a paid day-off. On January 13th he did not report to work nor did he call-in.

5. On January 14, he called in to report that he would not be coming to work. By practice, the receptionist enters all call-ins by employees in a diary and assigns a number to each call-in. Mr. Green's call is logged in the diary with the notation "broke hand at home". Based on this documentation, I am satisfied that it accurately notes the reason Mr. Green gave for his absence on January 14th.

6. The evidence is that on January 16th Mr. Green left for Acapulco, Mexico and returned on January 23rd. Apart from his call on the 14th, he had no further contact with his employer. It is uncontradicted that he did not at any time inform anyone in management that he was going to Mexico. The employer became aware of his visit to Mexico only because a supervisor also happened to be in Acapulco during the same period and happened to bump into Mr. Green and another employee, Mr. Dan Berthiaume. Mr. Berthiaume had called in on January 15th to report that he will be off on sickness allowance "for a week or so".

7. When the two employees had returned from Mexico, on January 27, 1988 Mr. Green and Mr. Berthiaume were summoned to a meeting with management and union representatives. Management confronted them with the allegation that they were seen in Mexico while on sick pay, and informed them that they were subject to discharge unless they were able to provide a satisfactory explanation. Mr. Green's explanation was that he had injured his hand during a karate tournament on the week end (January 7/8), that on January 11, 1988 he attended at the hospital and was advised to see his family physician because he had a fractured hand. He explained that he called his doctor on January 15, 1988 and was given an appointment for January 19, 1988. Mr. Green told the management that after he had made the appointment on January 15th, he got a free ticket to Mexico. As a result he cancelled the doctor's appointment and left for Mexico the next day. Management reserved its decision at the end of the meeting. At the meeting, Mr. Paul Dubruiel argued that since Mr. Green was legitimately off sick, it did not matter where he was during his time of.

8. After the meeting, the Mr. Green accompanied his union representatives to the union office. He gave his version of the facts, which were written down by a union official on a fact sheet. Mr. Green reviewed the fact sheet for accuracy. Shortly afterwards, the management announced that a decision had been made to discharge Mr. Green, as well as Mr. Berthiaume. The union representatives immediately prepared a grievances on behalf of both employees and filed them.

9. The union attended Mr. Green's third step grievance meeting armed with a sick and accident benefits form filled in by Dr. J. D. Wonham. The doctor had indicated in the form that the complainant was disabled from January 10th to "the present" and that he should be able to return to work on January 28th. Mr. Green also provided a note from the same doctor indicating that he was partially disabled from January 11th to January 27, 1988. When these documents were presented to the management, it was quickly pointed out that it had a number of problems. The doctor had only seen the complainant once and that was on January 28th, *after* his discharge. Based on his visit on January 28th, the doctor had certified that the complainant had been disabled from the 10th. Since the doctor also had indicated that the complainant was ready to return to work on January 28th, which was the date of the examination, presumably the doctor found nothing wrong with him that day. Therefore, management pointed out that the doctor must have simply certified disability for the period as requested by the complainant. The management also pointed out that while the S & A form stated that the complainant was disabled from January 10th, Mr. Green had worked his full shift on January 11th. Management refused to give any weight to the document and questioned the doctor's credibility. The company also pointed out that when he called in on January 14th he had stated that he broke his hand at home and that now he was claiming he injured his hand at a Karate tournament. The grievance was denied.

10. A meeting of the union's screening committee was convened on February 11, 1988, to consider whether Mr. Green's grievance should proceed to arbitration. Mr. Green was invited and attended the meeting. He again repeated his story including his claim that he had visited the hospital on January 11th. When Mr. Dubruiel insisted that he tell the truth, the complainant finally conceded that he had not been to the hospital as he had claimed and that the only doctor who saw him before his discharge was the attending physician at the Karate tournament. He could not provide Mr. Dubruiel with any information as to the doctor's name or address.

11. It was pointed out to the complainant that his medical evidence was not credible and not likely to be believed by an arbitrator. There was a discussion that the union is unlikely to succeed at arbitration. Mr. Gerry Bastian, the union's Regional Director, then suggested that since that was a negotiation year, the best route to take in the circumstances was to withdraw the grievance and give notice to the company that the grievance will be dealt with during negotiations. Mr. Green did not voice any objection to this proposal. Accordingly, on March 11, 1988, the union informed the employer that it was tabling the complainant's grievance as well as the discharge grievance of Mr. Berthiaume, for resolution during negotiations.

12. The contract negotiations commenced in May 1988. There were three discharge grievances (those of Mr. Green, Mr. Berthiaume and a Mr. Lalond) and approximately 12 other grievances tabled for discussion. As per practice, the grievances were dealt with at the commencement of the negotiations. While the majority of the other grievances were resolved, there was no progress on the three discharges. The employer refused to compromise on those. Accordingly, those were put aside and the parties focused on negotiating a collective agreement. After a total of twenty-four meetings, a tentative collective agreement was agreed upon.

13. At that point, the union once again raised the three discharge grievances. The company steadfastly refused to agree to reinstate Mr. Green and Mr. Berthiaume. Mr. Gerry Bastian, the union's Regional Director finally prevailed over the company by pointing out that these two grievances can scuttle the two million dollar contract that had just been tentatively agreed to. The company was finally persuaded that it had little to lose by reinstating the two employees on strict conditions. When the union started negotiating for the returning employees' seniority, the company was not willing to grant any seniority to Mr. Green or Mr. Berthiaume. However, after some argument back and forth the union persuaded the company to agree to grant each of these employees 41 days seniority. The union considered this important because employees had lay-off protection only after 40 days. Thus, on the last day of negotiations, the employer agreed to reinstate the grievors with 41 days seniority and subject to contract settlement agreement. The terms of the contract settlement agreements were set out by the company orally.

14. The terms of reinstatement agreed to on behalf of Mr. Green and Mr. Berthiaume were very similar. The evidence is that this form of agreement had been used before in reinstating discharged employees. Mr. Dubruiel testified that the employer made it clear that it expected Mr. Green to be a "model employee" for the one year period of the agreement. It was also made clear that Mr. Green was expected to maintain the plant average in attendance and that for that purpose, workers' compensation and sickness and accident absences will be counted as work disruptions. Mr. Dubruiel testified that it bothered him that weekly indemnity and workers' compensation absences are to be held against Mr. Green and that he raised his concerns with Mr. Doug Hewitt, the Personnel Director. Mr. Hewitt assured Mr. Dubruiel that obvious serious injuries will be excused, but not where the employee claims "I have a sore this or that" and takes time off.

15. On June 17th, a union meeting was held to ratify the tentative collective agreement. Mr. Dubruiel explained the terms of the contract to the members and also described the resolution

of the grievances, including the three discharge grievances. He explained that the reinstatement of the three employees was conditional upon the collective agreement being ratified. Some members expressed concern that the union may have traded off benefits under the collective agreement in exchange for the reinstatements. Mr. Dubruiel assured them that it was only after the tentative contract was agreed upon that the discharge grievances were dealt with. The contract was ratified by the union membership.

16. Mr. Green attended the ratification meeting. He did not speak at the meeting, but after the vote asked Mr. Dubruiel what the contract settlement agreement stated. Mr. Dubruiel told him that he had not yet seen the document itself but explained what he had agreed to with management. He asked the complainant to attend at the union office on June 20th to sign the agreement.

17. On June 20th Mr. Hewitt gave Mr. Dubruiel the contract settlement agreements he had prepared for Mr. Berthiaume and Mr. Green. Mr. Dubruiel reviewed them and found that the documents accurately reflected what had been agreed upon. That afternoon, Mr. Green visited the union office, and read the agreement. Mr. Dubruiel explained that that was the best deal the union could negotiate to get his job. He was told that for one year he has to be a model employee. Mr. Dubruiel asked Mr. Green if he had any problems with the terms. The complainant inquired why he only had 41 days seniority. Mr. Dubruiel explained that the company initially refused any seniority and that the union had to fight hard to get even the 41 days. Then Mr. Green raised concerns about the inclusion of sick and accident and workers' compensation absences. Mr. Dubruiel again explained that he was not very pleased with that either, but that this was the best the union could get out of the company. When the complainant continued to object Mr. Dubruiel stated that he cannot force Mr. Green to sign it, that it was up to him to decide. Mr. Green then reluctantly signed the document.

18. The contract settlement agreement in question reads as follows:

FABRICATED STEEL PRODUCTS JUNE 17, 1988

RE: WILLIAM GREEN

CONTRACT SETTLEMENT AGREEMENT

THE COMPANY AGREES TO REINSTATE THE ABOVE WITH 41 DAYS OF SENIORITY AND THE APPROPRIATE SENIORITY DATE WITH THE FOLLOWING STIPULATIONS:

THE PARTIES RECOGNIZE THAT IN THE IMMEDIATE PAST, THE GRIEVOR HAS EXHIBITED AN ATTITUDE TOWARD NORMAL COMPANY REQUIREMENTS SUCH AS PRODUCTION, GOOD WORK HABITS, WORK RULES, PLANT CONDUCT AND ABSENTEEISM THAT IS UNACCEPTABLE TO THE COMPANY.

FOLLOWING REINSTATEMENT, THE PARTIES AGREE THAT ANY VARIATION FROM NORMAL AND ACCEPTABLE WORK PRACTICES COULD RESULT IN IMMEDIATE TERMINATION.

THE ABOVE PRACTISES INCLUDE MEETING THE DETERMINED PLANT AVERAGE IN ATTENDANCE. WORK DISRUPTIONS SHALL INCLUDE ANY LOST TIME BECAUSE OF WEEKLY INDEMNITY OR WORKERS COMPENSATION CLAIMS.

ANY VARIATION, IF THERE SHOULD BE ONE, WOULD BECOME A MATTER THAT WOULD BE DISCUSSED BY THE PLANT CHAIRPERSON AND THE PERSONNEL DIRECTOR AND ANY DECISION OF THE COMPANY WOULD NOT BE SUBJECT TO THE GRIEVANCE PROCEDURE.

THIS AGREEMENT IS WITHOUT PREJUDICE AND WILL REMAIN IN EFFECT FOR A PERIOD OF TWELVE WORKING MONTHS FOLLOWING HIS RETURN TO WORK.

DOUG HEWITT

PAUL DUBRUIEL

WILLIAM GREEN

PERSONNEL DIRECTOR

PLANT CHAIRPERSON

DATED: *June 20/88*

19. The evidence is that Mr. Green returned to work the next day June 21st, 1988, under the agreement and continued to work until his subsequent discharge on April 4, 1989. The uncontradicted evidence is that during this period Mr. Green did not indicate in any way either to the union or to management that he objected to the terms of his reinstatement.

20. The first indication from the employer that it had concerns about Mr. Green's compliance with the terms of the contract settlement agreement was when it sent a letter on or about April 3, 1989, setting out Mr. Green's record from the time of his reinstatement pursuant to the contract settlement agreement. The letter stated that Mr. Hewitt wished to discuss Mr. Green's record with Mr. Dubruiel "before a final decision to terminate is made". The letter listed a number of infractions, the first entry on June 27, 1988 and the last on March 8, 1989. The list consisted of 5 instances of "left early"; one "absent no call"; one "late"; one "poor effort low production"; one "unauthorised parking"; and seven instances of "W.C.B. medical aid".

21. As soon as he had read the letter, Mr. Dubruiel called Mr. Green in to the union office and showed him the letter. Mr. Green reviewed the record set out in the letter and questioned a number of "left early" allegations. Mr. Dubruiel made a note to check those. Mr. Green did not question any of the other entries including the 7 W.C.B. medical aids. This meeting between Mr. Dubruiel and Mr. Green lasted for over one hour.

22. Mr. Dubruiel then had Mr. Green's time cards checked and determined that three of the alleged infractions were erroneous and should come off.

23. Mr. Dubruiel, together with Mr. Ernie Fryer (union committee-person) next went to see Mr. Hewitt. He asked Mr. Hewitt what his concern was. When Mr. Hewitt pointed out that Mr. Green's record was not up to the plant average, Mr. Dubruiel argued that three of the infractions were incorrect. Mr. Hewitt responded that those can be deleted but gave two other dates, which he said had not got on the list because the computer had not yet recorded them. Mr. Hewitt took the position that Mr. Green had amassed a record that was well below the plant average and that he had failed to live up to his end of the contract settlement agreement. He pointed out that Mr. Green had 7 medical aid absences in the nine months since his return and that was about 25 times the plant average of .5. Mr. Dubruiel tried to reason that all of those medical aids were work related injuries which caused Mr. Green to visit the hospital and that he lost only a few hours each time. Mr. Hewitt then pointed out that Mr. Green had also had an absent no call, late attendance and had been disciplined for poor production and for unauthorised parking and that he had proved that he is simply not a good employee. Mr. Hewitt showed a memorandum dated March 11, 1989 wherein he instructed the clerks in his office to put together Mr. Green's record since his return in June 1988. Mr. Dubruiel conceded that Mr. Green's record may be "a little below average", but argued that he did not deserve to be discharged for that. He requested Mr. Hewitt to at least consider extending Mr. Green's probation period for an additional 6 months to allow him to improve his record. The meeting ended with Mr. Hewitt undertaking to communicate the management's decision.

24. The next day, April 4th, the union representatives and Mr. Green were summoned to a meeting with members of management. Mr. Hewitt reviewed the history of how the union had fought for Mr. Green and got his job back and that Mr. Green had not lived up to his end of the contract, but had amassed an atrocious record. Mr. Hewitt informed Mr. Green that the company had no choice but to let him go. Mr. Dubruiel intervened and inquired if Mr. Hewitt had considered his request for an extension of Mr. Green's probation. Mr. Hewitt said that he had considered it, but concluded that Mr. Green did not deserve that consideration. Mr. Green did not say anything other than request a copy of his personnel file. Mr. Hewitt informed him that he wanted Mr. Green out of the company premises immediately.

25. The union officials walked back to the union office with Mr. Green. Two supervisors walked behind them and stood outside the union office waiting to escort Mr. Green off the premises. They wanted a union official to accompany them while Mr. Green cleared his locker and left. Mr. Dubruiel asked Mr. Green to sign a blank grievance form and informed him that he would complete it and file it. He asked Mr. Fryer to escort Mr. Green off the premises along with the two supervisors. Before he left, Mr. Green requested for a copy of his union file and Mr. Dubruiel agreed to send it.

26. The same day Mr. Dubruiel completed and filed Mr. Green's grievance. Having done that, he discussed with the union's grievance committee what to do with Mr. Green's grievance. It was the consensus of the whole committee that the grievance was not going to be successful. They considered all the medical aids, the absence without call, lateness, the left earlies and the discipline for poor production and unauthorized parking. They reviewed a copy of an arbitration award issued by arbitrator Palmer, which stood for the proposition that arbitrators must enforce reinstatement agreements as they find them. That award had also held that the company was entitled to take into account authorized absences in considering whether a grievor under a reinstatement agreement had met the plant average. The general consensus was that there was no basis to proceed with the grievance.

27. There is a direct conflict in the evidence as to what happened next. Mr. Dubruiel testified that on April 5th, he called Mr. Green from the union office, in the presence of Mr. Fryer. According to Mr. Dubruiel, he informed Mr. Green that the committee had decided that there was nothing the union can do to get his job back and that the only thing that the union may be able to do was to get the company to agree to put "quit" on his separation papers in return for Mr. Green agreeing to withdraw the grievance. Mr. Dubruiel explained to Mr. Green that that will make it much easier for Mr. Green to find another job. According to Mr. Dubruiel, Mr. Green's response was "do whatever is best". Mr. Dubruiel filed in evidence a memo-to-file, which he had written right after the phone call, confirming the gist of this conversation. Mr. Fryer also corroborated Mr. Dubruiel's evidence that he was present when Mr. Dubruiel had this conversation with Mr. Green.

28. According to Mr. Dubruiel, he then met Mr. Hewitt and informed him that the union was prepared to withdraw Mr. Green's grievance if Mr. Hewitt was prepared to put "quit" on his separation papers. After about 15 minutes of discussion, Mr. Hewitt agreed to do it.

29. Mr. Dubruiel testified that on April 7th, Mr. Green called him to acknowledge receipt of his union file which Mr. Dubruiel had mailed to him. When Mr. Green inquired where his grievance was, Mr. Dubruiel informed him that the grievance was withdrawn and that Mr. Hewitt had agreed to put "quit". Mr. Green said "OK" and requested that he be sent a copy of his grievance. Mr. Dubruiel filed in evidence a memo-to-file which he had prepared at that time, recording this conversation with Mr. Green. He testified that he mailed a second package to Mr. Green, including a copy of the grievance and copies of the two memoranda-to-file.

30. Mr. Green denies that either of the two phone conversations took place. He specifically denies that he agreed to let the union decide whatever is best and insists he did not agree to withdraw the grievance in return for the company putting "quit" on his separation papers.

31. It is not clear whether the counsel for the complainant was contending in his final submissions that the union violated section 68 by negotiating the particular terms of the contract settlement agreement for Mr. Green. If he did, such an argument fails. The complainant put himself in a situation where he was caught in Mexico while claiming sick benefits. He had not informed anyone that he was going to Mexico and the medical evidence he had come up with after his discharge did not support his claim of a legitimate illness. He was untruthful with the company as well as with the union. The only medical evidence he was able to produce was obtained after the fact. If anything, the only consequence of that medical evidence was to call into serious question the credibility of the physician who issued it. The evidence indicates that the union spent time to assess the situation. A decision was made that the grievance was not likely to succeed at arbitration and that the best chance of getting Mr. Green's job back was by raising the matter during negotiations. The union held up the tentative collective agreement to force the company to agree to reinstate Mr. Green. While at first, the company refused to recognize any seniority, the union was able to negotiate 41 days seniority for Mr. Green, which gave him some measure of protection against lay-off.

32. Mr. Green was clearly advised that those were the best terms the union was able to extract out of the company. He was obviously not happy with the terms. Nor were the union officials. However, they were facing the reality that that was the only possible means of getting Mr. Green's job back. Mr. Green signed the document when faced with the choice of unemployment and returning under the terms offered by the company. The evidence is that the form and terms of the agreement were standard. It had been used many times in the past as a last resort to have employees facing discharge reinstated. The same agreement was negotiated on behalf of Mr. Berthiaume. The complainant took advantage of the agreement and returned to work and continued to work for over 9 months without raising any complaint about the terms of his reinstatement.

33. There is not a scintilla of evidence to suggest that the union acted in any manner contrary to section 68 in getting Mr. Green reinstated. The union put its mind to the situation and concluded in good faith, and I must add not unreasonably, that in the circumstances, it was in Mr. Green's best interest to return to his job albeit under stringent conditions. In negotiating this settlement agreement, the union did not deviate from its usual manner of handling discharge grievances, which had little chance of succeeding at arbitration. In all of circumstances, there is no basis to find a contravention of section 68 in the manner the union dealt with Mr. Green's discharge grievance. See, *Chrysler Canada Ltd.*, [1979] OLRB Rep. July 618. Besides, Mr. Green, having taken advantage of the agreement to return to work, is not entitled to challenge its terms later. See, *Unal Duran*, [1986] OLRB Rep. Aug. 1068. Even if he did not authorize the union to agree to these terms, by taking advantage of the agreement by signing it and returning to work under it, he acquiesced and cannot be heard to complain later.

34. The thrust of the complainant's case is that the union's handling of Mr. Green's subsequent grievance against this discharge on April 4, 1989 and its ultimate withdrawal short of arbitration constituted a contravention of section 68. The main contention is that the union withdrew the grievance without consent from Mr. Green.

35. In resolving the issue of credibility, I have no hesitation in preferring the evidence of Mr. Dubruiel over that of Mr. Green. The evidence indicates that Mr. Green had not been honest in dealings with both company and union officials. During his dealings regarding his trip to Mexico he initially reported that he visited the hospital before his departure. After he was exposed, he

finally admitted that his only visit to a doctor was after his discharge. He first reported that he broke his hand at home. Subsequently he claimed that the injury occurred during a Karate tournament at a High School. It was also revealed that he offered money to a doctor to provide medical evidence to justify his absence. During his testimony before the Board, Mr. Green was not candid. He would not admit to any wrong-doing despite what was on his employment record. For example, he claimed that he "always made production" and kept his "nose clean". However, he had been disciplined for poor effort and production and for breach of parking rules. He also had an absence without calling in and a late attendance. None of these had been grieved or challenged by Mr. Green. During his testimony, his ability to recall events was obviously influenced by self-interest.

36. On the other hand Mr. Dubruiel testified in a straight-forward manner. His evidence about the two phone calls to Mr. Green were substantiated by his memorandum to file which had been written contemporaneously. Mr. Fryer testified that he was present when Mr. Dubruiel had the first telephone conversation with Mr. Green. The fact that soon after, Mr. Dubruiel approached Mr. Hewitt and proposed that "quit" be substituted in Mr. Green's separation papers in place of "discharge" is consistent with the rest of the evidence indicating that the two telephone conversations actually occurred. For the Board to accept Mr. Green's testimony, it must find that the two memoranda-to-file submitted in evidence are fabrications on Mr. Dubruiel's part and that Mr. Dubruiel also faked a telephone conversation with Mr. Green in Mr. Fryer's presence. There is no reasonable basis for such a finding, particularly in light of the very suspect credibility of Mr. Green's own testimony. Accordingly, I find that Mr. Dubruiel did have Mr. Green's consent to withdraw his grievance in return for the company's agreement to put down "quit" on his separation papers.

37. Counsel for the complainant conceded that if the credibility issue set out above is decided against Mr. Green, the complaint must necessarily fail. However, the Board wishes to deal with another argument made by counsel. Counsel recognizes that the union has the right to settle or withdraw grievances in certain circumstances even where the grievor wishes to proceed to arbitration. He conceded that the union is entitled to balance the grievor's interests with the interests of the majority in the bargaining unit in deciding whether to proceed with a grievance. However, counsel submits that the grievor's interests may only be balanced against the interests of other "identified" union members.

38. In the case at hand the union has historically treated contract settlement agreements as a final desperate means of getting an employee's job back, when there is no other avenue available. In agreeing to Mr. Green's reinstatement, it was the union's understanding that for a period of twelve months, the company was expecting the employee to be a model employee who met at least the plant average in attendance and work practices. Mr. Dubruiel testified that if an employee under a contract settlement agreement accumulated a poor record during the twelve months period, the union was not prepared to confront the company with technical arguments or to "nitpick". The union believed that if it resorted to these tactics, it would lose its credibility with the company and that it will not be able to get employees reinstated under contract settlement agreements in the future.

39. The Board finds the union's approach in the circumstances to be a very reasonable one and that it is not in contravention of section 68. It is critical for a bargaining agent that it maintain credibility with the employer. The union honestly believed that Mr. Green had contravened the agreement as understood between the union and the employer. It reviewed the list of infractions with Mr. Green and checked out those that were questioned by him. In those circumstances, the decision not to proceed with the grievance, even if undertaken without the concurrence of Mr. Green, would not have constituted a contravention of section 68. I do not accept counsel's argu-

ment that the union is not entitled to balance an employee's interest with the future interest of the bargaining unit generally and the union's interest in its own credibility with the company.

40. For all of those reasons, a contravention of section 68 has not been established and this complaint is hereby dismissed.

3097-89-U; 3163-89-U Labourers' International Union of North America, Local 183, Complainant v. **International Union of Operating Engineers, Local 793**, Respondent; International Union of Operating Engineers, Local 793, Complainant v. Labourers' International Union of North America, Local 183, Respondent

Construction Industry - Jurisdictional Dispute - Unfair Labour Practice - Labourers and Operating Engineers filing unfair labour practice complaints against each other alleging breach of section 67 of the Act - Board dismissing complaints on grounds that both, in substance, jurisdictional disputes - Board also indicating that it would exercise its discretion and decline to hear Operating Engineers' complaint because of delay and because, in any event, it would not grant the remedy requested

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *R. M. Sloan* and *R. R. Montague*.

APPEARANCES: *L. A. Richmond*, *T. Dionisio*, *J. Diaz* and *J. Kovacs* for the Labourers', Local 183; *Dave Watson*, *Richard Kennedy*, *Vito Monteseono* and *Jack Slaughter* for Operating Engineers, Local 793.

DECISION OF THE BOARD; November 8, 1990

1. These two complaints were filed pursuant to section 89 of the *Labour Relations Act* ("the Act"). In each instance the applicant asserts that the respondent has violated sections 67 and 70 of the Act. For ease of reference the parties to these proceedings will be referred to as the Labourers and the Operating Engineers.

2. The Board notes that a number of companies carrying on business as "Landscape Contractors" were named as parties potentially affected by the complaints and were duly served with notice of the date, time, place and purpose of hearing. None of these companies appeared at the hearing before us on September 18, 1990. The Board was advised by counsel for the Labourers that one of the companies had been present while the parties met with a Labour Relations Officer and attempted to resolve this matter on the morning of the day scheduled for hearing. That company was Lakeshore Landscape Associates (I.C.I.) Ltd. which has been improperly named in the correspondence from the Board as Lakeshore Landscape Associates (1984) Ltd. That company did not participate in the hearing but advised Labourers' counsel that it wished to continue to be advised of future hearing dates in this matter.

3. Both the Labourers and the Operating Engineers have made preliminary motions in which each asks that the Board dismiss the complaint filed by the other.

4. The Operating Engineers submit that the Labourers' complaint should be dismissed

because it does not raise a *prima facie* case and/or the complaint is, at its root and substance, a jurisdictional dispute which should not be dealt with in the context of an unfair labour practice complaint. The Operating Engineers ask us to exercise our discretion and refuse to hear the complaint for that reason. The Labourers submit that the Operating Engineers' complaint should not be heard by the Board because of undue delay.

5. For the purpose of dealing with each of these preliminary motions we have assumed that the facts as pleaded by each party are true. We have also considered the documents referred to in those pleadings as well as a number of documents which the parties agreed could be admitted as evidence for purposes of this preliminary motion only. Those documents would have to be proved in the usual course if either of these complaints proceed to a hearing on the merits.

6. In order to get the full flavour of each party's complaint against the other it is convenient to set out *verbatim* the pleadings of the parties.

The Complaint of the Operating Engineers

The Complainant relies on the following statement of material facts:

- (i) Since at least 1976, the Complainant and the Respondent have negotiated Collective Agreements covering employees employed in landscaping performing work in Ontario Labour Relations Board Area Numbers 8 and 18 for whom the respective unions have bargaining rights.
- (ii) There has been a single document containing two (2) Collective Agreements. The Recognition Clause in the current combined Collective Agreements, which is similar to the Recognition Clauses in preceding Collective Agreements reads as follows:

The Employer recognizes the Union as the bargaining agent for and this Collective Agreement shall apply to all of its employees employed in its landscaping division in Ontario Labour Relations Board Area Numbers 8 and 18.
- (iii) The composition of the bargaining committee representing the Complainant and Respondent in negotiations with the relevant Employers has varied over the years. On certain occasions representatives of both the Complainant and Respondent have attended. On other occasions, the Complainant has given the Respondent specific instructions as to its demands for inclusion in the Collective Agreement, and the Respondent's representatives have conducted the face to face bargaining on behalf of both the Complainant and the Respondent.
- (iv) In negotiations for the 1988-1990 renewal of the Agreement, the latter practice prevailed. Mr. Richard Kennedy, Labour Relations Manager of the Complainant, gave Mr. Anthony Dionisio, President of the Respondent, specific instructions as to the items which the Complainant wished included in its portion of the relevant Collective Agreement. Mr. Dionisio conducted the actual face to face negotiations with the relevant Employers. At no time was Mr. Dionisio authorized to change the content of Article XII, nor at any time did he inform the Complainant that he was negotiating to do so.
- (v) After the Respondent had completed negotiations of the Collective Agreement on behalf of both the Complainant and the Respondent, representatives of the Respondent repeatedly refused to provide copies of said Agreement to the Complainant. Representatives of the Complainant consulted with legal counsel as to whether an Unfair Labour Practice Complaint should be lodged against the respondent in order to obtain copies of the Collective Agreement. In the interest of trade union solidarity and co-operation, the Complainant decided not to pursue this approach.
- (vi) The Complainant received actual notice of the purported changes made to Article XII

of the Collective Agreement after Mr. Ed Sherwin, Business Representative of the Complainant, attended at a pre-job conference in July, 1989 concerning landscaping work at an Ontario Hydro site. Ontario Hydro then raised the issue of certain work being awarded to the Labourers' Union on the basis of the 1988-1990 Landscaping Agreement. Mr. Sherwin then alerted Mr. Kennedy to this fact, and finally the Complainant's representative obtained a copy of the 1988-1990 Landscaping Agreement which Mr. Kennedy discovered contained significant incursions into the Complainant's bargaining rights.

- (vii) Unbeknownst to Mr. Kennedy, by this time, the Respondent had forwarded certain copies of the Collective Agreements with various relevant Employers to the Complainant for signature. A few of these Collective Agreements were inadvertently signed on behalf of the Complainant by some of the Complainant's business representatives. Once Mr. Kennedy became aware of the purported changes to Article XII, no further of the individual Agreements were signed. Mr. Kennedy decided that the best method for remedying the problem was to resolve the matter in the course of 1990-1992 negotiations.
- (viii) The purported changes to Article XII objected to by the complainant are the inclusion of the following classifications in the Local 183 category:

Drillers of all types, high pressure water equipment, small trenchers, mini skid steer loaders and all similar small equipment.

It is noteworthy that similar proposals were made by the Respondent in its negotiations with the Metropolitan Toronto Road Builders' Association, Metropolitan Toronto Sewer and Watermain Contractors' Association and Utility Contractors' Association of Ontario Agreements in the 1988-1990 round of negotiation, and prompted Unfair Labour Practice Charges by the Complainant in O.L.R.B. File Numbers 3384-87-U and 3497-87-U. The eventual result of these complaints was that these proposals were withdrawn by the Respondent and did not form part of the above-noted Collective Agreements. These proposals have apparently been re-submitted by the Respondent in those sets of negotiations for the 1990-1992 term and the Complainant has again filed Unfair Labour Practice Charges as a result of this.

- (ix) At the 1992 [sic] negotiations with the relevant Employers (the identity of which is set out in Schedule "D" attached hereto) the Complainant has tabled a proposal on classifications that reflects its traditional work jurisdiction in the landscaping, utility, road building and sewer and watermain sectors, which reflects what the Complainant authorized the respondent to negotiate in the 1988-1990 Agreement. Unfortunately, the Respondent misrepresented its bargaining authority to the relevant Employers and thus attempted to transfer a portion of the Complainant's bargaining rights to itself. Later the Respondent sought to conceal its activities to the greatest extent possible and now claims that the Complainant has acquiesced to this unauthorized and improper change in classifications.
- (x) Therefore, the Complainant complains that the Respondent has purported to bargain for and continues to purport to bargain for bargaining rights now held by the Complainant with the relevant Employers, and will continue negotiations to an impasse to attempt to maintain the bargaining rights always held by the Complainant. The Complainant further complains that the Respondent's Employers will be forced to accede to the unlawful demands of the Respondent to avoid a strike by the Respondent.
- (xi) Hence, it is the position of the Complainant that the actions of the Respondent are in blatant violation of Sections 67 and 70 of the *Ontario Labour Relations Act*.

The Complaint of the Labourers

1. For a number of years the Labourers International Union of North America, Local 183 and the International Union of Operating Engineers, Local 793 have negotiated collective agreements covering employees employed in landscaping performing work

in Ontario Labour Relations Board Areas No. 8 and 18 for whom the respective unions have bargaining rights.

2. There has been a single document containing two collective agreements. The recognition clause in the current combined collective agreements, which is similar to the recognition clause in preceding collective agreements, reads as follows:
 - 1.01 The employer recognizes the union as the bargaining agent for, and this collective agreement shall apply to, all of its employees employed in its Landscaping Division, in Ontario Labour Relations Board Area No. 8 and 18.
3. Over a period of time, Labourers' Local 183 has played the dominant role in negotiating the combined landscaping agreements with the individual employers concerned.
4. In 1988-1990, the collective agreements were negotiated in a similar fashion; Mr. A. Dionissio, on behalf of Labourers', Local 183 and various representatives of the respective employers negotiated the agreements. Local 793 at no time disputed anything in the 1988-1990 collective agreements.
5. The respective bargaining units of the two unions are set out in Article XII of the combined landscaping agreements.
6. As the date approached for negotiations for the 1990-1992 landscaping agreements, Mr. Dionissio informed Mr. Kennedy of Local 793 that the negotiations were upcoming. On the first day of negotiations, Mr. Dionissio attended on behalf of Labourers', Local 183, Mr. Vito Monteseono and Mr. John Monty attended the negotiations representing Local 793. At these negotiations, representatives of Local 793 questioned the make up of the labourers' bargaining unit set out in Article XII of the collective agreements.
7. Following the initial negotiation meetings, the Operating Engineers, Local 793 submitted proposals for the renegotiation of the landscaping agreements for the period 1990-1992.
8. Local 793's proposal regarding Article XII unambiguously claims to represent and bargain on behalf of employees in the bargaining unit of Labourers' Local 183.
9. The Labourers' International Union of North America, Local 183 complains that the International Union of Operating Engineers, Local 793 has, by bargaining to alter Article XII of the combined landscaping collective agreements violated section 67(2) to the *Ontario Labour Relations Act*. The Operating Engineers' are attempting to bargain with or enter into a collective agreement covering employees of various employers in circumstances where those employees are represented by labourers' Local 183.
10. In addition, the Labourers' complain that Local 793 will continue negotiations to an impasse to obtain the bargaining rights now held by Labourers' 183. The Labourers' complain further that the various employers party to the landscaping agreements will be forced to accede to the unlawful demands of Local 793 to avoid a strike by Local 793.
11. The complainant complains that the actions of the respondent Local 793 thereby violate s.67(2) and s.70 of the *Labour Relations Act*

7. In addition to these pleadings, the agreed upon documentation and certain undisputed facts referred to in argument indicate the following events after the filing of these complaints. We note that the Labourers' application was filed March 15, 1990. The Operating Engineers' application was filed March 20, 1990.

8. On April 14, 1990 "No Board Report(s)" were issued. Those No-Board Report(s) pur-

ported to relate to each of the individual employer landscape contractors (who were bound to the 1988-1990 agreement with the Labourers and Operating Engineers) and the two unions. After the issuance of the No-Board Report(s) the Labourers engaged in lawful strike activity. Thereafter, the Labourers entered into a Memorandum of Settlement settling a new collective agreement for May 1, 1990 to April 30, 1992 with the relevant employers. That Memorandum of Settlement does not on its face refer to or otherwise bind the Operating Engineers. The Operating Engineers trade union was not a party to that Memorandum of Settlement.

9. In his submissions to the Board counsel for the Operating Engineers stated that the union does not view itself bound by the Minutes of Settlement or the collective agreement entered into by the Labourers. He indicated that the Operating Engineers have, since the No-Board Report(s) entered into collective agreements with certain employers previously signatory to the expired collective agreement between the employers and the Operating Engineers and the Labourers. The Operating Engineers continue to attempt to negotiate with other relevant employers.

10. In our view and as noted below, these intervening events have affected and altered the remedies for relief requested by each of the parties in their complaints. In its claim for relief the Operating Engineers sought the following.

The Complainant request the following relief:

- (i) a Declaration that the Respondent have violated Sections 67 and 70 of the *Ontario Labour Relations Act*;
- (ii) an Order that the Respondent cease and desist from violating the *Ontario Labour Relations Act* as aforesaid;
- (iii) a Declaration that the changes to Article XII purportedly effected by the 1988-1990 agreement between the Respondent and the relevant Employers are a violation of the *Ontario Labour Relations Act*;
- (iv) an Order that the Respondent withdraw its proposal to include said purported changes to Article XII or any similar proposals as items for negotiation between the Respondent and the relevant Employers;
- (v) a Declaration that the purported changes to Article XII of the 1988-1990 agreement, and any agreement to include them in any other Collective Agreement between the Respondent and the relevant Employers is null and void;
- (vi) an Order that the Respondent cease interfering with the bargaining rights of the Complainant;
- (vii) an Order that the Respondent post and/or mail notices detailing their violations of the *Ontario Labour Relations Act* on all job sites where the Collective Agreement between the Respondent and the relevant Employers is in effect;
- (viii) an Order that the Respondent compensate the Complainant for all losses incurred as a result of the Respondent's violations of the *Ontario Labour Relations Act*, including interest thereon and legal fees; and
- (ix) such further and other relief as may be appropriate.

In his submissions counsel for the Operating Engineers asked the Board to fashion an "appropriate" remedy for the breaches of the Act committed by the Labourers. In so doing, counsel argued that where there is a wrong there should be a remedy.

11. In its complaint the Labourers request relief similar to that found in the Operating

Engineers' complaint. The Labourers for example seek a declaration that the Operating Engineers' proposal in respect of wage rate and classifications to the landscape contractors with whom it seeks to negotiate a collective agreement violates the *Labour Relations Act*, must be withdrawn by the Operating Engineers, and is null and void if included in any collective agreement entered into between the Operating Engineers and the relevant employers.

12. The crux of the complaints before us is the Operating Engineers' assertions that during the bargaining for the 1988-1990 collective agreement Mr. Dionisio exceeded his jurisdiction by negotiating changes to the "Wage Rates and Classifications" to the detriment and prejudice of the Operating Engineers. The Operating Engineers allege that the jurisdiction and right to represent which it asserts over employees employed in the classifications of "drillers of all types, high pressure water equipment, small trenches, mini skids steer loaders and all other similar small equipment" was taken away from its "classifications" and placed under those classifications recognized in the collective agreement to be "Labourers" classifications.

13. Prior to the 1988-1990 agreement Article XII stated as follows:

ARTICLE XII - "WAGE RATES AND CLASSIFICATIONS" FOR LOCAL 183

	<i>May 1/86</i>	<i>May 1/87</i>
Labourers (including sod roller operators)	\$13.17	\$13.69
Landscape Gardeners, Farm tractors without excavating attachments, fork lifts, truck drivers, load bearing boom trucks, Operators, machine driven tools on any other equipment that is operated by remote control	\$13.32	\$13.84
Form Setters, concrete finishers, landscape stone setters, landscape brick setters, landscape irrigation, pipelayers, float drivers, Reinforcing steelman	\$13.67	\$14.19
<i>For Local 793</i>		
Grader Operator	\$14.67	\$15.24
Dozer & Loader Operator & Backhoe Operator	\$14.57	\$15.14
Drivers of Farm Tractor with pulverizing or fine grading equipment	\$14.42	\$14.99

The 1988-1990 agreement reads as follows (the changes are underlined):

ARTICLE XII - "WAGE RATES AND CLASSIFICATIONS" FOR LOCAL 183

	<i>May 1/88</i>	<i>May 1/89</i>
1. Labourers (including sod roller operators)	\$15.19	\$16.29
2. Landscape Gardeners, Farm tractors without excavating attachments, fork lifts, truck drivers, load bearing boom trucks, Operators, machine driven tools on any other equipment that is operated by remote control	\$15.34	\$16.44
3. Form Setters, concrete finishers, landscape stone setters <i>of all types</i> , landscape brick setters, landscape irrigation, pipe layers, float drivers, reinforcing steelmen, drillers of all types, high pressure water equipment, small trenchers, mini-skid steer loaders, and all other similar small equipment	\$15.69	\$16.79

For Local 793

1. Drivers of Farm Tractor with pulverizing or fine grading equipment	\$16.49	\$17.59
2. Dozer & Loader Operator & Backhoe Operator	\$16.64	\$17.74
3. Grader Operator	\$16.74	\$17.84

14. The Operating Engineers submit that the changes to Article XII negotiated by the Labourers interfere with the Operating Engineers' right to represent employees in its bargaining unit and is contrary to section 67(2). The Operating Engineers allege the Labourers' conduct violates section 67(2) as the Labourers have "bargain[ed] with or enter[ed] into a collective agreement with an employer or an employer's organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them" represented by the Operating Engineers. They also assert the Labourers' conduct violate section 70.

15. For their part the Labourers assert that the Operating Engineers' attempts to "rectify" or "alter" (for want of better words) its classification clause in the 1990-1992 collective agreement is similarly a violation of section 67(2) and section 70. The changes to the wage rates and classification clause proposed by the Operating Engineers in the current bargaining would include in its classification the following:

FOR LOCAL 793

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1. Operators of: Farm Tractors with attachments, Compactors - Self Propelled, Davis Ditchers and other similar equipment, Kubota type Backhoes and Combination type similar equipment, Skid Steer Loaders and similar equipment.
2. Operators of: Bulldozers, Scrapers, Emcos, Front End Loaders, Overhead Loaders and similar equipment.
3. Operators of: Backhoes, Graders, Mechanics.
4. Operators operating equipment requiring licensed or certified Operators shall be paid wages and conditions according to the prevailing Area Agreement for the class and character of the work being performed.

This, it is asserted by the Labourers, is a violation of section 67(2) and section 70.

16. The Board has carefully considered the submissions of the parties and hereby dismisses both applications insofar as the applications allege a violation of section 70. Neither the pleadings nor the agreed upon documentation or facts disclose that either trade union has sought by intimidation or coercion to compel any person to refrain from exercising rights under the Act. *At best* the circumstances disclose that each of the trade unions has sought to gain through collective agreement negotiations certain advantages for itself and its members which adversely affect the other union. Each union is attempting to assert its own claim to certain work or its own claim to represent particular employees. That does not constitute a violation of section 70.

Decision in respect of the Complaint by the Labourers

17. Counsel for the Labourers asserts that its complaint is not rooted in a jurisdictional dispute. He argues that the dispute between the two unions is "which union represents persons who do this work". He submits that there is a clear separation between the concepts of "jurisdiction"

and "bargaining rights" and that the Labourers' complaint is in respect of the latter. The issue is not about which union has the work, but which of the two unions has the bargaining rights to represent the employees doing the work.

18. We do not agree. In our view the complaint of the Labourers is, at its root, nothing more than a jurisdictional dispute under the guise of an unfair labour practice complaint and tenuous assertions about an interference with, or derogation of bargaining rights. There is nothing in the pleadings or the documents which have been admitted into evidence which indicates that the Operating Engineers are attempting to represent employees in a bargaining unit represented by the Labourers. We find the following statements of the Board in *Ontario Hydro*, [1985] OLRB Rep. Feb. 307 at 310 to be equally applicable to the case at hand:

... In our opinion the complainant and the respondent trade unions are confronting each other over a perceived overlap in work jurisdiction and not with respect to bargaining rights. The Board has previously considered complaints under what is now section 89 of the Act with respect to section 67 (formerly section 59). In *Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022, the Board stated at page 1034:

Nor can it be said that the subcontracting clause interferes with another union's bargaining rights contrary to section 56 [now section 64] and 59 [now section 67] of the Act. In the Board's view, there is no exact equation between bargaining rights and work jurisdiction, as the complainant attempted to make out. While the Board recognizes that, without a supporting work jurisdiction, bargaining rights in the construction industry may wither, the two concepts are not congruent. Under the Labour Relations Act, bargaining rights acquired either through the certification process or by voluntary recognition only entitle a union to be recognized as the exclusive bargaining agent for a particular group of employees. The bargaining rights conferred by law do not give a union any particular work jurisdiction, and any claim to a work jurisdiction must be asserted and established in the bargaining process through such means as a sub-contracting provision. Sections 56 [now section 64] and 59 [now section 67] of the Act are intended to protect bargaining rights only and these sections cannot be interpreted as providing protection to a work jurisdiction. Conflicting claims to a particular work receive much different legislative treatment, being subject to the procedure established in section 81 [now section 91] of the Act for the resolution of jurisdictional disputes.

The Board dismissed the complaints with respect to the sections referred to in the quotation and several other sections of the Act.

8. In *Toronto Star Newspapers Limited*, [1979] OLRB Rep. May 451, the Board also considered whether the work jurisdiction and bargaining rights are synonymous and the relative place of jurisdictional disputes and stated at page 456:

While the Board recognizes that bargaining units are often defined in terms of certain job classifications or work categories, these descriptions do not mean that the bargaining agent has an absolute right to the work being performed by the group of employees falling within such job classifications. The reference to work categories in the bargaining unit descriptions, although serving to identify the employees falling within the bargaining unit, does not by itself create an unqualified entitlement to that work. The fact is that some other bargaining agent may also have bargaining rights for other employees of that same employer that are defined in terms of different work categories, and some of the work performed by the employees falling within these work categories may overlap to some degree that of the other group of employees. Job categories are not watertight and, in fact, there may be considerable leakage between categories, giving rise to competing claims for work from bargaining agents. This sort of problem, as a general rule, is not treated as one involving representation

rights of the competing bargaining agents but as a dispute over work jurisdiction. The Act contemplates that such competing claims to work are to be resolved through the jurisdictional dispute procedures set out in section 81 [now section 91].

and again at page 457:

The Board is convinced that this complaint is nothing more than a latent jurisdictional dispute. It is clear to us that the complainant, by framing its argument in terms of a derogation of bargaining rights, is attempting to assert an absolute claim to the work in question. If the Board were to grant the remedy requested by the complainant, it would have the effect of preventing the respondent union from making any claim to the work in question. Even if Local 35-P has the better claim to the work in question, and we make no finding in this regard, such a claim should be asserted through the jurisdictional dispute provisions under section 81 of the Act, and not by means of an unfair labour practice complaint.

Decision in respect of the Complaint by the Operating Engineers

19. Counsel for the Operating Engineers asserts that its complaint is “qualitatively different” than the complaint filed by the Labourers. He submits that the complaint involves “representational” and not “jurisdictional” claims.

20. Counsel for the Operating Engineers has argued that prior to the 1988-1990 collective agreement in which the Labourers’ Representative “usurped” the Operating Engineers’ bargaining rights, the collective agreement between the relevant employers and the Labourers and Operating Engineers was a “Council type” agreement. Although there was only one document, that document encompassed two separate collective agreements relating to two separate bargaining units - one collective agreement which each employer had with the Operating Engineers and one collective agreement which each employer had with the Labourers. Together, that document covered the “all employee” bargaining unit referred to in the recognition clause. He submitted that in a “Council-type” collective agreement, changes to the classification and work jurisdictions of one of the trade unions necessarily affects the other trade union’s representational rights. He argued that in a “Council-type” agreement, one cannot “give” a classification and the right to represent employees in that classification to one union without at the same time decreasing the other trade union’s right to represent employees.

21. Counsel for the Operating Engineers argued that given this “Council-type” agreement, the conduct of Mr. Dionisio during the negotiations for the 1988-1990 agreement was an interference with the Operating Engineers’ bargaining rights. Counsel asserted that Mr. Dionisio bargained with a view to having the Labourers represent employees whom he knew were in the Operating Engineers’ bargaining unit encompassed in the collective agreement.

22. In our view, the alleged conduct of Mr. Dionisio does not make the Operating Engineers’ complaint “qualitatively different”. Mr. Dionisio’s conduct does not alter the fact that the Operating Engineers’ complaint is also, in substance, a dispute about jurisdiction.

23. During the negotiations for the 1988-1990 collective agreement, the Operating Engineers explicitly gave Mr. Dionisio authority to bargain on its behalf and took no part in the negotiations. Mr. Dionisio was the Operating Engineers’ negotiator or representative at the bargaining table. The Operating Engineers’ complaint is about the conduct of its own representative at the bargaining table. In these circumstances the Operating Engineers cannot complain that it is a violation of the *Labour Relations Act* that the person which it appointed to represent it during the negotiations is not bargaining in the manner desired or instructed.

24. In our view, even if the facts as pleaded by the Operating Engineers did raise a *prima facie* case we would exercise our discretion and decline to hear the complaint because of delay and because in any event we would not grant the remedy or relief requested.

25. On its face the complaint refers to conduct which occurred during the 1988-1990 collective agreement negotiations. The Operating Engineers' assertions that it did not have actual knowledge of the conduct cannot, in the circumstances of this case, excuse the delay in filing this application. The Operating Engineers trade union is an experienced trade union which ought to have known the terms and conditions of the collective agreement which had been negotiated on its behalf and to which it was bound.

26. The delay is particularly damaging because of the intervening events. It is admitted that during the 1990-1992 negotiations each of these trade unions has gone its own way to negotiate its own collective agreement with the relevant employers. After its strike action the Labourers have negotiated a collective agreement which includes the very same provisions which the Operating Engineers desire the Board to declare null and void in paragraph 5 of its Claim for Relief. There has not been an allegation that any of the employers bound to the 1988-1990 collective agreement, or any of the employers bound to the 1990-1992 collective agreement with the Labourers have violated the *Labour Relations Act*. Even if we had jurisdiction to do so, in these circumstances the Board would not declare null and void any part of the collective agreement as against an employer party who had not breached the Act (see *Cuddy Food Products Ltd*, [1988] OLRB Rep. Dec. 1211 and the cases referred to therein for an analysis which addresses whether the Board has such remedial jurisdiction and the circumstances in which it should be exercised.) Similarly, we are of the view that in the circumstances of this case, the other remedial relief sought by the Operating Engineers is not appropriate even if we found that the Labourers had breached the Act.

27. Counsel for the Operating Engineers has indicated that the Operating Engineers have and continue to negotiate collective agreements with the relevant landscape contractors. In the "Proposals for the Landscape Agreement" tabled by the Operating Engineers and tendered as an agreed upon document the Operating Engineers have proposed, for example that "skid steer loaders and similar equipment" be added under the wage and classifications of the Operating Engineers in Article 12 of the Agreement. The Operating Engineers assert that such a proposed amendment does not interfere with or encroach upon the bargaining rights and classifications of the Labourers as it does not delete any part of the Labourers' classifications. Nonetheless the Operating Engineers trade union is "concerned" that if it continues to assert its bargaining rights to represent employees employed in such classifications, the Labourers (who already have collective agreements with the same employers which also contain these classifications) will engage in conduct which will thwart or hinder the ability of the Operating Engineers to negotiate changes to the classifications found in the expired 1988-1990 agreement. In this regard counsel referred to the potential of "picketing" by the Labourers and the fact that the Labourers might file complaints or grievances against either the employers or the Operating Engineers seeking damages. For this reason counsel for the Operating Engineers urges us to adjudicate upon its complaint. In effect he seeks ultimately to obtain a determination that "skid steer loaders and similar equipment" properly fall within the Operating Engineers' classifications and were improperly and in violation of section 67(2) placed in the "Labourers'" classifications during the 1988-1990 negotiations.

28. In our view, counsel's submissions in this regard are speculative insofar as they assert conduct in which the Labourers *might* engage. In addition, these submissions again highlight that in fact *both* these complaints in essence involve a jurisdictional dispute. As stated by the Board in *Ontario Hydro*, *supra*, jurisdictional disputes should not be adjudicated under the guise of a sec-

tion 89 complaint but should be dealt with in the manner and procedure set out in the Act and the Rules.

29. For all of these reasons both of these complaints are dismissed.

30. The Registrar is directed to send a copy of this decision to Lakeshore Landscape Associates (I.C.I.) Ltd.

0003-90-R International Brotherhood of Electrical Workers, Local 353, Applicant v. Agincourt Electric and/or Agincourt Electrical Contracting Company and/or KNK Limited, Respondents

Construction Industry - Related Employer - Parties agreeing that legal requirements for single employer declaration present - Whether Union's delay in bringing application should result in its dismissal - Board focussing on actual prejudice and its connection to union inaction - Board making section 1(4) declaration but limiting its effect to commercial activities or contracts entered into after receipt of section 1(4) application

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. Lear* and *P. V. Grasso*.

APPEARANCES: *Elizabeth Mitchell* and *Bill Martindale* for the applicant; *Pamela Yudcovitch* for the respondents.

DECISION OF THE BOARD; February 27, 1991

I

1. This is an application under section 1(4) of the *Labour Relations Act*. The applicant union contends that the respondents, "Agincourt" and "KNK", should be declared to be "one employer" for labour relations purposes. The relevant provisions of the Act are as follows:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

(5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

If a section 1(4) declaration were made, KNK (an ostensibly "non-union" firm) would be bound by the collective agreement previously binding Agincourt.

2. The parties agree that the legal requirements for a section 1(4) declaration are present: namely: Agincourt and KNK carry on related business activities under the common control and

direction of Lorne Harvey, their owner. KNK contends however that no section 1(4) declaration should issue. In KNK's submission, the union was aware of KNK's existence for some time prior to this application and, accordingly, having "slept on its rights", should not now be entitled to a single employer declaration.

3. The facts are not substantially in dispute. Many of them are contained in an agreed statement filed with the Board. Others were established by witnesses familiar with the respondents' operations. Credibility is not in issue.

II

4. Lorne Harvey, the principal of both respondents, became a journeyman electrician in 1968 and eventually became a union member. In 1979, he began carrying on business as an electrical contractor. In 1980 he registered the business name of Agincourt Electrical Contracting. Agincourt's head office was located at 1466A Kingston Road, Scarborough.

5. On December 21, 1979, Lorne Harvey, on behalf of Agincourt, executed a voluntary recognition agreement with the union. As a result, Agincourt became bound to the provincial collective agreement between the electrical trade bargaining agency of the Electrical Contractors Association of Ontario and the Ontario Construction Council of the IBEW. The collective agreement sets out the wages, benefits and working conditions which must be provided to employees, requires an employer to hire union members to meet its labour requirements, and limits the ability of an employer to sub-contract electricians' work to non-union firms. These provisions channel work to union members and prevent the employer from effectively erasing bargaining rights by hiring new employees who are not union members, will not insist on the terms of the collective agreement, and may even move to terminate the union's bargaining rights.

6. About fifty per cent of Agincourt's business involved the installation of refrigeration equipment at food stores, including Dominion Stores and the conversions of Dominion Stores to Mr. Grocer outlets. Agincourt's other significant clients were A. E. LePage and Canada Permanent Trust for which the company did "Phase 2" electrical work. Mr. Harvey worked either by himself, with his son, or with as many as eight IBEW electricians, depending upon the volume of business. Those workers were hired and paid in accordance with the terms of the collective agreement.

7. In the latter part of 1984 and early 1985 Mr. Harvey faced a series of business and personal problems. Among the business problems were the sale of Canada Permanent Trust, the demise of Dominion Stores, and a general restructuring of the retail food industry. Among the personal problems were the death of one of Mr. Harvey's sons, the death of his mother, a divorce, and a serious accident. All of these events contributed to Agincourt's troubled financial situation.

8. During this period Agincourt was under pressure, and did not consistently apply the terms of the collective agreement. This resulted in two applications to the Board under section 124 of the Act. In separate decisions in April and August of 1985, the Board found that Agincourt had failed to pay the benefits prescribed in the collective agreement, and had improperly hired "non-union" electricians rather than unemployed union members.

9. By this time Mr. Harvey's personal relations with the union were not particularly amicable. There was a dispute concerning Mr. Harvey's alleged breaches of the union constitution (he had retained his membership), fines payable thereunder, and the manner in which that debt could be discharged. There was also a dispute concerning the admission of Mr. Harvey's son into union membership. Mr. Harvey wanted his son to work for Agincourt, and expected union membership

to be extended more or less automatically. The union was reluctant to either expand its membership base at a time when so many established members were unemployed, or give special preference to the children of employers. From Mr. Harvey's perspective, of course, the union affiliation which had once seemed desirable was now contributing to mounting personal and financial difficulties.

10. In January 1985 Agincourt ceased bidding on contracts, and in June of 1985 Agincourt's last job was completed. By this time, Mr. Harvey himself was the only electrician working for Agincourt. On July 26, 1985 Mr. Harvey advised the union, in writing, that Agincourt would cease operations and that he would be going to manage a non-union firm.

11. Whatever Mr. Harvey's intentions may have been in July 1985, he did not in fact take up a position as manager for some unrelated non-union company. On August 27, 1985 KNK was incorporated. Its head office was 1466B Kingston Road (i.e., next door to Agincourt's former office), and its first director was Ross Harvey, Lorne Harvey's brother. Ross Harvey is not a licensed electrician, nor has he ever played a dominant role in the running of KNK.

12. Beginning in September 1985, Lorne Harvey began performing work with KNK, and in December 1985 KNK made its first bid on refrigeration work. After January 1986, KNK's primary clients became businesses in the food industry, including A & P, *New Dominion Stores* (i.e. those stores purchased by A & P but continuing under the Dominion name), and the Oshawa group. In June 1986, the business was formally transferred from Ross Harvey to Lorne Harvey. This legal transaction merely confirmed the commercial reality: KNK was Lorne Harvey's electrical contracting firm, and was, in substance, a continuation of the business formerly carried on as a sole proprietorship under the name of Agincourt. Mr. Harvey testified that he had learned the hard lessons of unlimited liability and wanted to put both his debts and old business arrangements behind him.

13. Apart from its lack of union affiliation (and related commercial consequences) the evidence suggests that KNK operated very much as its predecessor Agincourt had done. Most of its business was on the perimeter of Metropolitan Toronto with occasional forays west to Kitchener, St. Catharines, London and Niagara Falls, and east to Oshawa, Peterborough and Cobourg. For the most part, the jobs involved electrical work in retail food stores located in plazas or small shopping centres. Mr. Harvey was able to obtain this work as a result of his experience in the industry, established business contacts, and ability to fashion a competitive bid. Non-union electricians were hired on, laid off, or switched from job to job in accordance with the work flow. KNK did not seek out, or restrict its hiring to unemployed union members, nor did KNK apply the terms of the collective agreement.

14. At all material times Mr. Harvey has considered KNK to be a "non-union" company and has acted accordingly; however, there is no evidence that he actively sought to mislead the union or camouflage the nature of KNK's business activities. It was not unusual for KNK's employees to be working on the same site as unionized workers in other trades or to perform "Phase 2" electrical work following the "Phase 1" work done by unionized sub-contractors. KNK's trucks bear its logo, and would often be parked near the construction site.

15. On two or three occasions outside Metropolitan Toronto, local union business agents complained that KNK was performing work which should have been given to unionized sub-contractors. These disputes were resolved in accordance with the sub-contracting restrictions binding (or not) upon the owner/general contractor from which KNK received the work. On at least one occasion KNK withdrew from the site and sub-contracted its portion of the work to a unionized business. Apart from some casual conversations which will be discussed in more detail below, there was nothing to alert union business agents to the fact that KNK was owned by Mr. Harvey and

legally "related" to a unionized firm in Toronto which had purportedly gone out of business some months or years before. And, of course, Mr. Harvey's presence on a job site in an apparent managerial position is entirely consistent with his written advice to the union in July of 1985. It did not signify that Mr. Harvey was the *owner* of KNK nor highlight any connection with Agincourt.

16. But Mike Lloyd was suspicious. Mr. Lloyd was the business agent for Local 353 from 1983 to 1987 and knew both Lorne Harvey and his previous association with Agincourt. Mr. Lloyd also knew of Mr. Harvey's association with KNK and suspected that his relationship with that company might involve more than the managerial responsibilities of a work co-ordinator or site supervisor. Accordingly, Lloyd went to the Ministry of Consumer and Commercial Relations where he discovered that the name "KNK Electrical Contracting" was the registered business name of Lionel Arthur Marshall who lived at 119 Phillip Avenue in Scarborough. Lloyd went to that address and verified that it was a private home. A visit to Kitchener and worker inquiries made in June 1987 revealed only that Mr. Harvey had been present on a KNK job site and appeared to be "the boss" - a status entirely consistent with his advice to the union almost two years before. Lloyd did not know that Lionel Arthur Marshall is Mr. Harvey's brother-in-law. Mr. Lloyd knew the law, but he was unable to uncover the facts to support a 1(4) declaration.

17. Lloyd testified that, at the time he made his inquiries, there were almost five hundred electrical contractors in the Toronto area and only five business agents to monitor compliance with the collective agreements, undertake new organizing activities, and service the needs of the five thousand members of Local 353. There was little time for detective work. As a result of union elections, Lloyd left his position in August 1987.

18. Mr. Harvey testified that in 1988 there were conversations with union officials which either established or were premised upon their knowledge of his ownership role in KNK. These conversations took place at "Buster's", a Scarborough tavern that was patronized by union electricians. Mr. Harvey was not very clear when these discussions occurred because it was not unusual for him to go to Buster's, he had many casual conversations there, and he was never hesitant to express his views about the union, its policies, or his experience. Mr. Harvey's best recollection was that there were probably two conversations which occurred around the time of the electricians' strike - that is, some time in the weeks after May 1, 1988. Since KNK was a non-union contractor, it continued to operate during the strike and therefore once again came to the attention of the union. Mr. Harvey testified that there were several union officials present including Joe Fashion and Bob Gill.

19. As Mr. Harvey recalls it, the conversation touched upon a variety of topics including his experience with the union. As before, Mr. Harvey complained about the way in which he had been treated, and the union's reluctance to admit his son to membership. There were also comments about the strike, work he may have done that the union claimed outside Toronto, and his reluctance to "sign up" with the union. According to Harvey, Don Leach, the union dispatcher, was either present at Buster's or there were references to an earlier meeting with Leach in which Harvey had discussed the commercial difficulties he would face as a unionized contractor. A unionized contractor doing out-of-town work was required to hire local electricians and could neither carry a full crew from its home base nor flexibly transfer workers from job to job in accordance with daily work requirements. Leach allegedly conceded that KNK had little need for a union affiliation or connection but suggested that if circumstances changed the union would be pleased to "sign up" KNK.

20. Mr. Harvey's evidence was understandably hazy about conversations which were not considered legally significant at the time, and neither Leach, Gill or Fashion gave evidence. How-

ever, on balance and in context, we must conclude that the gist of the conversation (i.e. “signing up” with the union) involved not merely Mr. Harvey’s personal membership, but also a voluntary recognition agreement with KNK of the kind which Agincourt had signed in 1979. Whatever the details of KNK’s ownership, the tenor of the discussion and the comments attributed to the union officials suggest that they knew Mr. Harvey was directing its affairs in critical matters including those touching on labour relations. In other words, the union officials knew of the factual basis for a section 1(4) application even if it did not occur to them that this legal remedy was available. That appears to be the most probable explanation for inaction, for why else would they press Mr. Harvey to “sign up”?

21. In the Summer or early Fall of 1989 KNK was engaged to perform electrical work on a food store in Cobourg, Ontario, and in so doing came to the attention of Bob Hill, a union business agent from Oshawa. Hill told Harvey that KNK should not have been allowed on the Cobourg site, and that while KNK had “got away with it” in Oshawa before the union had a chance to take action, KNK would not get away with it again. Harvey told Hill that “we’re not joining the union”, but offered to hire a couple of union electricians to finish the job if the union was prepared to supply them. This was not acceptable to Hill. The next day Hill phoned Harvey and advised that he (Hill) had been speaking to Don Leach of Local 353, knew of Harvey’s previous union affiliation, and was aware of the difficulties surrounding his son. Hill suggested that if Harvey were prepared to “sign up” with the union, his son would be admitted to membership. Harvey refused and transferred the work to a unionized sub-contractor.

22. Mr. Hill did not give evidence but it seems clear that once again, the reference was not to Harvey’s personal membership in the union, but rather a voluntary recognition arrangement with KNK which would permit KNK to operate on a “union” project. Once again, Hill must have known that Harvey was directing the affairs of KNK and able to bind it to the provincial agreement. In none of these conversations was there any suggestion or expectation that there was some other owner or principal that Mr. Harvey would have to consult before taking such action. We find therefore that at the very latest, by the Summer-Fall of 1989, the union had actual knowledge of the factual basis upon which a section 1(4) application could be made and the threat which KNK posed, even if the officials in question did not know that section 1(4) was available to them.

23. The present application was filed on April 2, 1990.

III

24. The union argues that the facts establish not only the foundation for a section 1(4) declaration, but also the very mischief which section 1(4) was designed to avoid. In 1985, Agincourt, a sole proprietorship, encountered financial difficulties, stemming, in part, from its obligations under the collective agreement and the restrictions on the manner in which it could recruit, organize and pay its workforce. Those contractual terms channel work opportunities to union members by specifying union membership as a condition of employment and requiring an employer to meet its labour needs from the ranks of unemployed “union electricians” living in the locality in which the business operates. Agincourt breached those contractual obligations and wanted to be rid of them in the future. In the union’s submission, KNK is merely a “device” to accomplish that purpose. It is a new, avowedly “non-union” firm created barely weeks after Agincourt’s alleged demise, to continue the essentially same business for the same class of customers with a new legal entity and a new name - but no collective agreement or bargaining rights. In the union’s submission that is precisely what section 1(4) is designed to avoid.

25. KNK concedes that it is related in the sense contemplated by section 1(4); however, KNK contends that it is now too late for the union to insist upon its application. There has never

been any effort to hide KNK's business activities, the company continued to operate from premises adjacent to those formerly occupied by Agincourt, and Mr. Harvey continued to have occasional contact with union officials. In counsel's submission the union was aware of KNK, Mr. Harvey's role, and the potential erosion of its bargaining rights for up to two years prior to the present application. Meanwhile KNK has grown, established commercial links, and dealt with employees without any indication or expectation that the union would claim bargaining rights or the application of its collective agreement. KNK argues that the union has not exercised due diligence, has slept on its rights, and, as a matter of discretion, no section 1(4) declaration should now be made. We were referred to *Harold R. Stark Limited*, [1978] OLRB Rep. Oct. 945, *Faro Structural Steel (Toronto) Limited*, [1981] OLRB Rep. May 523, *John Hayman & Sons Company Limited*, [1984] OLRB Rep. June 822, and *Capricorn Acoustics & Drywall Ltd.*, [1986] OLRB Rep. March 308.

26. The application of the collective agreement is not neutral insofar as Mr. Harvey's family and business are concerned. All employees, including Mr. Harvey's son, would have to be union members and as Mr. Harvey discovered before, there is no guarantee that any of these individuals would be admitted to membership, or permitted to maintain the kind of work relationships (moving from site to site, for example) that they had enjoyed in the past. In addition, any employees in the bargaining unit at the time the declaration was made would *ipso facto* become represented by the union regardless of their wishes with respect to union membership. KNK's previously unfettered business activities would have to conform to the requirements and obligations of the provincial collective agreement.

27. On the delay issue, the union admits that KNK never sought to camouflage its activities as a non-union company, however, Mr. Harvey certainly did not advertise his ownership role in the company or the fact that he had effective control over it. On the contrary. Upon winding up Agincourt he indicated to the union that he was going to manage a non-union firm owned by someone else - not start one of his own - and to an outside observer that is precisely what happened. In the volatile world of the construction industry there is nothing unusual about a small employer encountering business difficulties and deciding to return "to the tools" or to work for someone else. That is what Mr. Harvey said he was going to do and what apparently happened. He cannot now say, in effect "you should have known I didn't do what I said I was going to do". The union could not know who owned KNK, nor the connection with Agincourt.

28. Counsel for the union points out that section 1(4) does not provide any express time limitation on the exercise of the Board's discretion, nor any obligation to exercise "due diligence". But, section 1(5) quite clearly indicates that the Legislature expected that a trade union would *not* be privy to information concerning the ownership or workings of a business, despite the fact that certain information may be filed with the Ministry of Consumer and Corporate Relations. In this case, of course, Mike Lloyd did become suspicious of KNK, did pursue an inquiry with the Ministry, and did undertake a follow-up in an effort to identify the apparent owner(s) of KNK. In counsel's submission the union has exercised due diligence and the above-mentioned conversations about KNK "signing up" with the union must be read in light of both Mr. Harvey's declaration of intent, and Mike Lloyd's investigation. The evidence must be considered "as a whole", and as a whole one cannot say that the union has abandoned its bargaining rights. No doubt, a union official would be wiser to file a section 1(4) application if there is the slightest suspicion that a non-union firm is "related" to a unionized business, because a 1(4) application would have provided a much faster and more effective way of ascertaining the facts than Mike Lloyd's patrol of KNK job sites, discussions with workers on those job sites, visit to the Ministry of Consumer and Commercial Relations, and investigation of the address of the individual apparently connected to KNK. However, counsel suggests that union business agents have more to do than launch legal proceedings on the basis of suspicion, or investigate the workings of non-union companies which may turn

out to be related to defunct union businesses. And if Lloyd *had* filed a 1(4) application in 1987, the declaration would have created the same alleged "prejudice" upon which KNK now relies: an obligation to apply the terms of the agreement. Counsel argues that, at its highest, delay should only be a factor in determining whether to give a section 1(4) declaration retrospective effect. It should not be an absolute bar.

IV

29. Section 1(4) of the Act was enacted in 1971. It deals with situations where the commercial activities which generate employment relationships regulated by the Act, may be carried on through more than one legal entity. Where those legal entities are engaged in related economic activities under common control or direction, the Board is empowered to "pierce the corporate veil" and declare them to be one employer for the purposes of the Act.

30. Section 1(4) clearly and specifically modifies both the common-law notion of "privity of contract" and commercial law assumptions based upon the separate legal identity of the corporate shell. As a result of section 1(4), collective agreement rights need not be co-extensive with the legal framework of the business. To this extent, labour law insulates collective bargaining from disruption should the exigencies of the market prompt an employer to change the number or form of the legal vehicles through which it carries on business. As a result of a 1975 amendment, section 1(4) no longer requires that related business activities be carried on simultaneously. The Legislature has recognized that the identity of the business (as opposed to its legal envelope) may be preserved even though the legal vehicles through which it is carried out may change from time to time.

31. A classic example of the "mischief" to which section 1(4) is directed can be illustrated by *Napev Construction Ltd.*, [1976] OLRB Rep. March 109 (application for judicial review dismissed by the Divisional Court on May 24, 1977, unreported). In that case, Napev was bound by a collective agreement with the Carpenters' Union which, for reasons which need not be explored here, Napev found too restrictive. To avoid these contractual obligations, the principals of Napev created a new and allegedly independent company named "Vepan", which then entered into less onerous commercial and collective bargaining relationships. When challenged, Vepan claimed that it was a different legal entity than Napev and that, by virtue of the common-law principle of "privity of contract" it was not bound by any of the obligations previously undertaken by Napev. It was clear to the Board, however, that Vepan was not a truly independent business. It was merely a device to avoid the restrictions of the Carpenters' collective agreement and permit more economic flexibility. The Board declared that Napev and Vepan were one employer for the purposes of the Act, and an application for judicial review was dismissed.

32. We do not suggest that *Napev* is necessarily representative of the dozens of cases which the Board has considered over the years, nor in our view is it necessary to undertake an exhaustive review of those cases. We mention *Napev* only because it illustrates a recurring problem in the construction industry to which section 1(4) was specifically directed: companies with established contractual relationships may find it advantageous to "spin off" related but purportedly independent companies, which then carry on business either "non-union" or with more congenial collective bargaining partners.

33. It is important to note that section 1(4) is not an unfair labour practice provision. Although some commercial dealings which trigger section 1(4) may constitute an unfair labour practice, section 1(4) itself does not require a finding of "anti-union animus". It is not limited to commercial "schemes" designed to escape from the union. It can also apply to *bona fide* business transactions which only incidentally frustrate established statutory rights. Section 1(4) is not a

“penalty” provision. It merely allows the Board to consider such business transactions from a labour relations perspective rather than common or commercial law rules.

34. The situation currently before us shares many similarities with *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, Oct. 1353. There, as here, the key principal behind one firm ceased to carry on an active business, then shortly thereafter, became the key principal behind a newly-formed company carrying on essentially the same business. In declaring them to be one employer, the Board commented:

Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase “whether or not simultaneously”. The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a “transfer of a business” which might trigger the application of section [63]. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before....

The amendment extends the ambit of section 1(4) to situations in which one business entity is actively carrying on business and the other is not. It is not necessary to have shared participation in a common business endeavour or even contemporaneous economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are “related” or “associated” because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be “related” within the meaning of section 1(4) even though their activities are carried on through different corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of “privity of contract” or “the corporate veil”.

(See also *Metro Century Construction Ltd.*, [1983] OLRB Rep. July 1122, and compare, *Roy Brandon Construction*, [1981] OLRB Rep. Feb. 219.)

35. *Napev* and *Brant* both illustrate the “mischief” to which section 1(4) is directed and the circumstances in which section 1(4) relief is typically granted. So does the present case. The only real issue is whether the Board’s discretion should be influenced by the union’s delay in bringing this application. This in turn, requires the Board to consider the significance of delay, together with the labour relations ramifications of the various alternatives open to it.

V

36. No one appeared on behalf of KNK’s employees so, strictly speaking, we have little direct evidence about their situation or their “stake” in KNK or its non-union status. In fact, given the fluid work force, we do not know how many active employees might be affected, nor how long or how often some of them may have worked for KNK. All we know is that the number of workers

potentially affected at any given time will be relatively small because like Agincourt, KNK hires workers in accordance with the amount of work available.

37. For the purposes of this decision, we are prepared to assume that none of KNK's employees support the declaration that the union seeks. KNK employees have their current positions (instead of unemployed union members) *only because* KNK has not applied the collective agreement in the manner which its predecessor, Agincourt, would have been obliged to do. Were it not for the new corporate shell, the non-union employees that KNK has hired from time to time, would be in the same position as the non-union workers whom Agincourt illegally hired in 1985, only a few weeks before KNK's incorporation. Mr. Harvey's son is a case in point: if he wishes to work for a unionized firm, he would have to join the union, as was the case with Agincourt.

38. On the other hand, the "prejudice" that employees might raise, is also the very "mischief" which the union claims arises because Mr. Harvey has repackaged his electrical contracting business in a new corporate shell which then disregarded the collective agreement in precisely the same way that Agincourt did in 1985. KNK hired non-union workers instead of unemployed union members. The "plight" of KNK workers precisely parallels that of non-employee members of the union who claim the protection of the preferential hiring clauses of the collective agreement. (In this regard see: *Blouin Drywall Contractors Ltd.* (1975) O.R. (2d) 103 (C.A.).) The KNK employees may face fewer work opportunities, unemployment or at the very least an obligation to join the union. The unemployed IBEW members claim jobs which, in their view, should have been theirs in the first place. The union members' claim rests on section 1(4) and a pre-existing collective agreement. The current employees' claim depends upon the Board not exercising its discretion under section 1(4), thereby giving permanent labour relations significance to the incorporation of KNK. In the *Great Atlantic and Pacific Company of Canada Limited*, [1981] OLRB Rep. March 285, the Board addressed this issue as follows:

15. We have considered the respondents' arguments with respect to "foisting" a union upon a group of employees who may not wish to be represented; however, we do not think that the wishes of the employees are the only, or even the predominant, factor to be considered in a section 1(4) application. If such were the case, the very erosion of bargaining rights which triggered the proceeding, (and which section 1(4) was designed to cure) could be raised as a bar. It is entirely typical that the employees of a related company will not be union members, for it is the creation of job opportunities ostensibly beyond the scope of the collective agreement, which constitutes the "erosion" of the union's bargaining rights. But for the creation of a separate vehicle, the work opportunities associated with the related business activity, and the conditions of employment of the employees engaged in that activity, would be regulated by the collective agreement. The very purpose of section 1(4) is to ensure that the union's bargaining rights and the scope of the collective agreement will not be restricted simply because an employer chooses to expand through a new corporate vehicle rather than its existing one. Nor do we think we can attach much significance to the fact that upon learning of the existence of a related employer, a union opts to utilize section 1(4) rather than apply for certification. The statute contemplates both types of application, and if the circumstances are such that section 1(4) can be applied, we do not consider it a proper exercise of our discretion to raise a bar simply because a union might have applied for certification. Indeed, if the two corporate entities otherwise satisfy the requirements of section 1(4), there are good labour relations reasons for making a section 1(4) order so that the collective bargaining structure will accord with the economic and industrial relations reality.

39. Like the employer in *Great Atlantic and Pacific*, counsel for KNK argues that section 1(4) should not be used as a "substitute for certification" or to "circumvent" the process of certification. We were referred, *inter alia*, to the Board's comments in *John Hayman & Sons Company Limited* at paragraph 21, and in *Harold R. Stark Limited*, *supra*, at paragraph 11. However, like the Board in *Great Atlantic and Pacific*, we do not think we can attach much significance to the fact that a union opts to utilize section 1(4) rather than apply for certification. The practical reason for

doing so has been outlined above: non-union workers intentionally hired contrary to the terms of the prevailing agreement, are unlikely to have much appetite for union representation. If unsuccessful organizing efforts constituted a bar, few 1(4) applications would ever be granted. There is also the implicit suggestion in these cases that certification is somehow to be preferred to a related employer declaration (which seems to be considered vaguely illegitimate), or that a statutory process that expressly contemplates the testing of employee wishes should influence the interpretation of a section which does not. Neither proposition stands up to close scrutiny.

40. From a purely historical perspective, we should note that section 1(4) was added to a pre-existing legal scheme which already included certification, and the Legislature did not make a 1(4) declaration conditional upon the exercise or attempted exercise of rights under what is now sections 5-12 of the Act. Nor did the Legislature spell out the possibility of a representation vote as it did in other parts of the Act dealing with bargaining rights or continued union representation. In 1975 the Legislature added the words "upon the application of any person..." thereby making it clear that section 1(4) stood on its own as an independent basis for relief. It did not have to "piggy back" on some other type of representation application as had previously been the case.

41. There is nothing in this legislative development that suggests that the wishes of new employees with respect to union representation should be given any special significance, or that the certification process should be the preferred method of affirming bargaining rights if the requirements of section 1(4) are otherwise met. The closest statutory relative is section 63 which preserves bargaining rights in the sale of a business even though there too, there is a change in the legal identity of the employer. Like section 1(4), section 63 prevents a unilateral commercial transaction undertaken by the employer from undermining established bargaining rights. But section 63 is not discretionary, and bargaining rights can continue whether or not the employee complement is maintained, and regardless of employee wishes. No one has suggested that section 63 should not be used as a "substitute for certification" and it is not intuitively obvious to us how that phrase assists in the application of section 1(4).

42. Against that background it is difficult to give definitive meaning to the phrase relied upon by counsel, other than as a general statement, made in particular cases, about the possible relevance of employee wishes, or a suggestion that the union should not acquire broader rights through section 1(4) than it would have had if the business activities under review were not being carried on through a separate corporate vehicle. We have already addressed the former issue directly, as did the Board in *Great Atlantic and Pacific*, however, it may be useful to digress for a moment to further examine the relationship between "certification", (which the employer says the union is seeking to *avoid*), "bargaining rights", (which the union says it is merely trying to *preserve*), and employee wishes.

43. Certification is a method of establishing bargaining rights and involves a survey of employee wishes at a particular point in time. In the construction industry, that point in time is the application date and the Board does not take into account, or canvass the wishes of employees in the unit after that date (see section 119(2) of the Act). Once established, a union's bargaining rights do not depend upon the shifting composition of the bargaining unit, nor does a trade union have to seek certification every time new employees are hired. In *Terra Nova Motor Inn Ltd.* 74 CLLC ¶14,253 (S.C.C.) Chief Justice Laskin put it this way:

... At the risk of being unnecessarily obvious, I must point out that the taking of a count of employees in order to satisfy certification requirements of proof that a majority are members of the applicant union does not mean that the certification and the union's status as bargaining agent continue to depend on the very employees remaining in the employer's employ. Fixing the number of employees as of a particular time to enable a count to be made does not mean that

the certificate which a union may obtain on that basis is tied to the identical employees or to that number. The subsequent enlargement or contraction of the work force does not alone affect the validity of the certificate and indeed, once a collective agreement is negotiated the certificate has served its purpose and is, for all practical purposes, spent.

Once bargaining rights are established, the employees' wishes with respect to trade union representation are irrelevant until they make a timely termination application, moreover, in the construction industry a union can conclude a collective agreement binding all new hires even though there are no employees in the bargaining unit at the time the agreement is entered into. (See section 121 of the Act.) In addition, a collective agreement may properly require all employees to be union members, and require their employer to hire new workers only from the ranks of unemployed union members (see section 46 of the Act and particularly 46(4)(d) which permits union security clauses in construction collective agreements even if the union has not been certified). Such union security provisions prevent an employer from populating the unit with workers whom an employer can rely on to oppose continued union representation. They prevent unilateral employer action from rendering academic any canvass of employee views.

44. Had Mr. Harvey's construction business continued as Agincourt there would be no question about the application of the collective agreement or the union's continuing status as bargaining agent. If Agincourt hired workers contrary to the terms of the agreement the union could demand their termination and replacement by union members, as well as compensation for those who should have been hired in the first place. The wishes or economic hardship of the displaced workers would be quite irrelevant, nor would anyone claim that enforcing the union security clause was "circumventing" the certification process. For example, no one urged the Board to consider the wishes of the non-union employees hired improperly back in 1985 (although no one minimizes the human impact of any decision reallocating scarce work opportunities). Why should the incorporation of KNK make any difference? On the facts of this case only because, as a matter of commercial law, KNK can now claim that it is different from Mr. Harvey or Agincourt, and not bound by their contractual obligations. But the purpose of section 1(4) is to eliminate the significance of the new corporate envelope, and that in turn, may make any question of certification academic because the union already has bargaining rights for that business.

45. It is only in this sense that section 1(4) is a "substitute for certification": it makes certification unnecessary because it recognizes that bargaining rights already exist. It is equally accurate to say that section 1(4) prevents the extinction of bargaining rights from unilateral employer action and/or commercial law considerations unrelated to labour relations. It prevents a termination of bargaining rights by means other than those provided by statute.

46. For these reasons (and despite the cases to which we were referred) we do not think it is very helpful to describe section 1(4) as a "substitute for certification" or to make the exercise of our discretion conditional upon the wishes of the employees that KNK currently has in its employ. The problem remains: do the circumstances, viewed as a whole, warrant the relief contemplated by section 1(4).

VI

47. In determining whether a 1(4) declaration should be made, a number of Board decisions mention either "delay", or alternatively, what the union "knew or ought to have known". In effect, having ruled early on that section 1(4) was not an unfair labour practice provision requiring fault on the employer's part, the Board began to inject "fault" on the union's part as a criterion for the exercise of the Board's discretion. But a union could not be held "at fault" if it did not know what was going on, and in language reminiscent of that used under termination section 59 ("sleep-

ing on its bargaining rights”), the Board turned to the further consideration of knowledge or constructive knowledge or what the union “should have known with due diligence”. However, these decisions must be read with care, and in light of both statutory changes, and the Board’s evolving jurisprudence.

48. In some of the earliest cases the non-union vehicle was created with the knowledge and tacit consent of the union in order to help the business to bid against non-union competitors - often with the understanding that union members would be utilized (albeit on terms less generous than those in the collective agreement). Relief from the area agreement gave the employer a competitive advantage while at the same time the use of another company made that concession less visible. The union was effectively a party to the arrangement it later attacked, (and which today might be prohibited by section 146(2) of the Act in any event). In other cases, the employees of the related company were already represented by another trade union by the time the section 1(4) application was made, so that a declaration would not merely restore the status quo, but would challenge new legal rights and obligations which were themselves based upon the statute. In these situations, it is hardly surprising that the Board was reluctant to make a related employer declaration - particularly when its retrospective impact might seem quite “unfair” and the Board had not yet considered whether the concluding words of section 1(4) allowed some variation or “fine tuning” of the remedy to avoid undesirable labour relations consequences.

49. As the Board has acquired more experience, however, the exercise of its discretion has become more sophisticated and responsive to both collective bargaining realities, and the arguments that are raised in particular cases. It is now clear, for example, that the Board can limit the retrospective effect of its declaration thereby significantly reducing the impact on an employer, (see for example, *Roy Brandon Construction*, [1981] OLRB Rep. Feb. 219 or *Krest Masonry Contracting Limited*, [1988] OLRB Rep. Aug. 813). The Board need no longer only grant or dismiss the application. There is a middle ground too.

50. There are both practical and policy reasons why the Board must be very careful in linking the exercise of its discretion to the actual or presumed state of a union’s knowledge either directly, or as an aspect of due diligence. In the first place, the union’s “mind”, is already an artificial construct composed, presumably, of the observations and calculations of a shifting complement of union officials, holding office throughout Ontario from time to time. A union can only “know” what its officials know, but in the real world of the construction industry, it may be entirely unrealistic to expect a union official to recognize not only the presence of a non-union company, but also its principals or corporate antecedents. “Knowing” that a “non-union” firm is in active competition with unionized companies or is bidding for work in the unionized part of the industry is *not* the same as “knowing” the facts necessary to found a related employer declaration. That is especially so in a case such as the present one where the unionized firm had ostensibly gone out of business and its principal had purportedly gone to manage someone else’s firm. A union’s resources are limited, and in any assessment of what the union “ought to have known” that must be taken into account.

51. Nor is the standard of “due diligence” easy to define or in this case was the union complacent. In 1988 (in the context of a conversation in a bar), some union officials seem to have appreciated Mr. Harvey’s position in KNK, but not to have known or thought about the application of section 1(4). On the other hand, Mike Lloyd did make inquiries with a view to a 1(4) application but could not come up with the necessary facts. His failure to uncover convincing evidence underlines why the Legislature considered it necessary to add section 1(5) to the Act, to which we will refer in a moment.

52. How does the employer establish what the union “knew” or “ought to have known” where, as here, there was no express representation *from* the union, and no notice *to the IBEW*, that KNK was to be or had become Mr. Harvey’s non-union successor to Agincourt? How does careful counsel establish “constructive knowledge”? By demonstrating circumstances from which the Board could reasonably infer that the trade union knew, “must” have known or “should” have known and acted upon, the facts upon which a section 1(4) application could be based. That is why we heard testimony about the size and prominence of the company’s signs, where its trucks are parked, KNK’s proximity to Buster’s bar, the drinking habits of electricians, whether union officials were likely to be there, whether there was a KNK business card posted near the telephone which officials might have seen and connected to Mr. Harvey, Mr. Harvey’s table talk, how often he was on a job site and in what apparent capacity, the number of union business agents available to do detective work, and so on. This focus on the union’s behaviour leads inevitably to uncertainty and more protracted litigation, and shifts the focus from the purpose of section 1(4), the prejudice to a related employer if a declaration is granted, and how that prejudice is related, if at all, to conduct of that union. It is also difficult to harmonize with section 1(5) of the Act.

53. Section 1(5) was added to the regulatory scheme in 1975, and reflects a legislative presumption that a trade union will not know much about the internal arrangements of a business, despite the various means available to it, including the filings required by certain statutes regulating commercial activities. Any purported limitation on access to 1(4) relief based on the union’s “due diligence” or knowledge, must take into account this legislative development. We fail to see how the Board in the exercise of its discretion can dismiss an application because it concludes that the union “should have known” or found out what the Legislature has quite clearly indicated a trade union will not be expected to know. And, again, those questions shift the focus from the purpose of section 1(4) and the prejudice to the employer if a declaration is made.

54. The prejudice to KNK of a related employer declaration is fairly easy to describe and is related directly to its ability to operate “non-union”. The incorporation of KNK gave Mr. Harvey both limited liability and a degree of flexibility that Agincourt did not have. With that advantage, KNK has been able to disregard the collective agreement and operate in ways which might not have been profitable or even possible if the agreement had applied. So long as the union remained either unaware of the connection with Agincourt, or unaware of the remedies under section 1(4), KNK could grow and prosper as a non-union business, without paying “union” wages or benefits and without using union members in the manner required by the agreement. Conversely, a section 1(4) declaration would eliminate a variety of competitive advantages associated with KNK’s “non-union” status. But that prejudice is present in every 1(4) case and is neither necessarily related or only related to the union’s behaviour.

55. The problem raised in this case, that was not addressed in *Stark*, *Faro Structural Steel*, *John Hayman* or *Capricorn*, is the actual *connection* between the union’s knowledge or conduct, and the prejudice which KNK would suffer should a related employer declaration be made. What prejudice flows from the union’s behaviour (delay, knowledge, etc.) which is not inherent in the declaration itself, whenever it is made? If, as counsel contends, a declaration will severely impact upon the way that KNK carries on business, that result would have occurred in 1987 when Mr. Lloyd became suspicious, in 1988 when Mr. Harvey had his chat with union officials in Buster’s bar, and in 1989 when Mr. Hill used other means to protect the union’s bargaining rights. Meanwhile, of course, for some five years KNK has benefited from the union’s ignorance or ineptitude. To borrow from the language of “estoppel”, what representation did the union make to KNK, and how has KNK acted to its detriment? The answers on the evidence in this case are: none, and not at all.

56. There was no express representation that the union would not assert bargaining rights, and even if the Board were prepared to infer a representation by conduct (based on ignorance of fact or law), there is no evidence that KNK changed its behaviour in any way. Mr. Harvey has always regarded KNK as non-union, and there is no evidence that Mr. Hill's remarks, or the conversation in Buster's tavern prompted any change in the way the company carried on business. The most that can be said is that, at all material times, Mr. Harvey regarded KNK as a new start, permitting him to leave behind both his personal creditors and collective bargaining obligations; and, on that assumption, KNK hired and paid its workers in a manner prohibited to Agincourt. We are prepared to infer that during this period the company engaged in profitable non-union jobs which it might not have undertaken had this 1(4) application been made or threatened earlier, but these commercial activities were not induced by anything the union said or did; moreover, if the "*ex post facto*" application of the agreement appears unfair, that inequity can be removed by limiting the retrospective effect of a related employer declaration. It is also worthwhile repeating that the mere passage of time has never, in itself, been considered a bar to a section 1(4) declaration, even though the adverse commercial impact increases with the longevity of the non-union firm. Nor has the Board been moved to dismiss an application because an "innocent employer" was unaware of section 1(4), or believed that the creation of a new company would allow it to disclaim the collective bargaining obligations binding the related firm.

57. In our view, where a trade union has established the legal requirements for a section 1(4) declaration, as well as the "mischief" which such declaration was designed to prevent, a declaration should ordinarily be made unless there is either particular prejudice or compelling policy reasons for not doing so. Those policy reasons should be rooted in labour relations rather than commercial law considerations, and the alleged prejudice should involve something more than having to apply a collective agreement which the related employer has disregarded in the past. If that were the test, the purpose of section 1(4) would be undermined, and the related employer could plead, in reply, the very "mischief" upon which the union relies and for which section 1(4) is a remedy. The argument becomes entirely circular. A union's undue delay in the face of knowledge of the corporate relationship (i.e. what section 1(5) suggests a union will *not* know) may be a factor to be considered in exercising the Board's discretion, but the focus should be on the actual prejudice suffered by the employer and the extent to which the union's inaction actually contributed to that prejudice. Where the union's inaction is so longstanding as to be tantamount to an abandonment of its bargaining rights, the Board may well dismiss the application. However, where the balance of labour relations interests can be achieved by limiting the retrospective effect of a declaration or granting such other relief "as it may deem appropriate", the Board should consider that option, rather than dismissing the application altogether.

58. Since the purpose and effect of a related employer declaration is to eliminate the labour relations significance of the new corporate vehicle, it may be useful in this case to consider how the situation would have been treated had KNK not been incorporated to undertake the electrical contracting business formerly carried on by Agincourt. Would the Board, on the facts before us, conclude that the trade union had abandoned its bargaining rights or was forever estopped from asserting the employee rights established in the provincial agreement? We do not think so; nor is this perspective mere speculation. As we have already mentioned, a refusal of a section 1(4) declaration would be tantamount to affirming a termination of bargaining rights to which Agincourt would not have been entitled under any section of the Act.

59. The union was actively asserting its members' rights against Agincourt in the weeks preceding KNK's incorporation, and Mike Lloyd's unsuccessful investigation two years later had precisely the same objective. Had he filed a 1(4) application in 1987, there is little doubt that it would have been granted, and without any limitation. But he did not, and as a result Mr. Harvey carried

on business as before, enjoying whatever benefits can be attributed to relief from the collective agreement. On the other hand, if no declaration is made, the Board will be ratifying an effective termination of bargaining rights - not upon application to the Board or even based upon the wishes of employees properly in the bargaining unit, but rather because Mr. Harvey created a new legal vehicle and it took some time for the trade union to respond. That response was certainly tardy - based, it seems, on ignorance of both the facts and the legal remedies available to it; however, it does not follow that there should be no declaration at all.

60. Having considered the evidence and competing considerations in this case, we are satisfied that the appropriate balance of labour relations interests can be fairly struck by making the section 1(4) declaration which the union seeks, but limiting its effect to those commercial activities or contracts entered into by KNK after receipt of notice of this section 1(4) application. When the union filed this 1(4) application, Mr. Harvey was put on notice that, thereafter, the commercial dealings of KNK might be affected by the collective agreement if the Board were persuaded to exercise its discretion in the union's favour (the legal prerequisites for doing so being conceded); however, we do not think that, in all the circumstances, a section 1(4) declaration should have retrospective effect.

61. It is necessary to make one concluding observation. Nothing in this decision should be taken as any retreat from the proposition that, ordinarily, a section 1(4) declaration will have retrospective effect. If it were otherwise, section 1(4) could easily be frustrated because of the time taken to detect, investigate, and litigate the status of the allegedly related company. (Compare the comments of the British Columbia Labour Relations Board in *Caledon Lands*, [1979] 3 Can LRBR 12, and this Board's comments in *J.D.S. Investments Ltd.*, [1981] OLRB Rep. March 294.) A section designed to eliminate the labour relations significance of the alternative corporate shell, could be avoided if new corporate shells were created or utilized quickly enough. In our view, that would be a curious interpretation of section 1(4), and is certainly not one to which we are generally attracted. In this case however, it is our view that no retrospective relief is warranted.

**2243-90-U Branimir Katkic, Complainant v. CAW Local 1285 and Terry Gorman
President of CAW Local 1285, Respondent**

Duty of Fair Representation - Ratification and Strike Vote - Unfair Labour Practice - Union holding secret ballot vote to ratify collective agreement - In addition, motion to endorse bargaining committee's recommendation adopted by show of hands - Whether show of hands a violation of section 72(4) of the Act - Board concluding that show of hands only serving to formally conclude discussion and not affecting secret ballot vote - Board also finding no violation of duty of fair representation - Complaint dismissed

BEFORE: S. A. Tacon, Vice-Chair, and Board Members W. H. Wightman and H. Peacock.

APPEARANCES: Branimir Katkic and James Peters for the complainant; Jim O'Neil, Terry Gorman, Joe P. Kremer and Vince Bailey for the respondent.

DECISION OF THE BOARD; February 21, 1991

1. This is a complaint pursuant to section 89 of the *Labour Relations Act* in which the complainant alleges a breach of sections 72(4) and 68 of the Act.

2. At the hearing, the Board gave the following oral ruling:

The Board has considered the submissions of the parties in the context of the evidence led before the Board through witnesses and documentary material. The Board regards it as appropriate to give its ruling orally.

The Board intends to briefly set out its factual findings, made after having weighed and assessed the evidence. The persons attending the meeting on October 28, 1990 were handed material indicating the highlights of the tentative collective agreement. Those persons also were handed a ballot. The Local President, T. Gorman, explained the ballot and the voting procedures, including the location of the ballot boxes. The explanation of the proposed collective agreement followed; questions were taken from the floor. During that discussion, which lasted over one hour, President Gorman indicated that the ballot boxes were open and that it would be appreciated if people cast ballots before leaving. People did cast ballots during the discussion portion of the meeting and some may have left without casting ballots. Following discussion, President Gorman called for a motion to endorse the bargaining committee's recommendation in favour of the collective agreement. That motion was moved, seconded, and adopted by a show of hands. Those remaining at the meeting at that point, approximately one quarter of those present initially, were then told to vote. The first meeting concerned the production workers; that was followed by a skilled trades meeting and their vote. The results were announced to those few still present after the meetings and the votes were counted. The results for the entire Chrysler contract (including five Locals) were announced subsequent to the ratification votes of all affected Locals.

Section 72(4) of the Act reads:

• • •

(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.

• • •

Given the evidence, and having considered the parties' submissions, the Board finds that the respondent did not contravene section 72(4) of the Act. There was a secret ballot vote to ratify the collective agreement. That vote was clearly conducted in a manner that a person expressing his or her choice could not be identified with that choice expressed. The Board is not persuaded that the show of hands to endorse the committee's recommendation is covered by section 72(4) or constitutes a violation of section 72(4) in the circumstances of this case. In the Board's view, the show of hands served only to formally conclude the discussion and did not affect the secret ballot vote and it was only the secret ballot vote which was relevant to determining whether or not the collective agreement was ratified.

With respect to the allegation that section 68 was breached, that section reads:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The Board has heard no evidence which would found such a violation of the Act.

Therefore, for the foregoing reasons, the Board hereby dismisses the complaint.

1634-90-G; 2010-90-R Labourers' International Union of North America - Local 1059, Applicant v. **M. Concrete Forming**, Respondent; The Labourers' International Union of North America, Local 1059, Applicant v. 643210 Ontario Inc., operated by M. Concrete Forming and M. Concrete Forming Limited, Respondents

Construction Industry - Construction Industry Grievance - Sale of Business - Related Employer - Unionized numbered company ceasing operations - Sole owner of numbered company incorporating new company and operating non-union - Both companies performing same concrete forming work - Board issuing related employer declaration but finding insufficient evidence of sale of business - Employer in breach of collective agreement - Damages calculated and compensation ordered

BEFORE: *R. A. Furness*, Vice-Chair, and Board Members *W. N. Fraser* and *J. A. Redshaw*.

APPEARANCES: *L. A. Richmond* and *T. Da Costa* for the applicant; *Benjamin Melo* for the respondents.

DECISION OF THE BOARD; February 8, 1991

1. In Board File No. 1634-90-G the applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.
2. In Board File No. 2010-90-R the applicant has applied to the Board under sections 63 and 1(4) of the *Labour Relations Act* with respect to its bargaining rights as a result of either a sale of a business by 643210 Ontario Inc., operated by M. Concrete Forming to M. Concrete Forming Limited which allegedly occurred on or about June 1, 1990, or, as a result of the respondents being associated or related employers within the meaning of section 1(4) of the *Labour Relations Act*.
3. The Board heard evidence from Benjamin Melo who appeared before the Board as a result of a warrant for the arrest of a defaulting witness and also heard evidence from Tony Da Costa, a representative of the applicant.
4. 643210 Ontario Inc. was incorporated on November 21, 1985. Mr. Melo was the sole owner and director and was also the president and the secretary. M. Concrete Forming Limited (the "new company") was incorporated on April 30, 1990. Mr. Melo was the sole owner and director and was also the president, secretary and treasurer. At the time of the hearing both companies were in existence. The numbered company ceased commercial operations at the end of May 1990. The numbered company encountered financial difficulties and, acting upon legal and accounting advice, Mr. Melo caused the new company to be incorporated. Both companies performed the same work, namely, concrete forming with respect to foundation walls, floors, sidewalks, drive-ways and similar structures in concrete.
5. The numbered company owned forms and a spray for the forms and used two trucks (1979 and 1981 models) which were and are personally owned by Mr. Melo. The new company purchased the forms from the numbered company. Mr. Melo personally paid some of the indebtedness of the numbered company with respect to concrete supplies. This left some \$300,000 owing by the numbered company. He also believed that, in addition to leaving financial problems behind him with the new company, he could operate the new company without being bound by a collec-

tive agreement with the applicant. Accordingly, he did not pay the rates and did not make the contributions required by the collective agreement. Mr. Melo prepared the estimates, made the bids and did the lay-out work for both companies. Without Mr. Melo neither company would exist. He informed the Board that customers know they are dealing with him and that they do not care which company they are dealing with.

6. The applicant and the numbered company are bound by a collective agreement in which the applicant is the bargaining agent for all construction employees engaged in concrete forming and finishing construction on all construction projects within the counties of Middlesex, Bruce, Elgin, Oxford, Perth and Huron, save and except non-working foremen and persons above the rank of non-working foreman, office clerical and engineering staff (the "collective agreement"). The collective agreement became effective on March 1, 1989, and remains in effect until February 28, 1991.

7. In *Walters Lithographing Co. Limited*, [1971] OLRB Rep. July 406, the Board set forth the following criteria in determining whether there is common direction or control: 1) common ownership or financial control; 2) common management; 3) interrelationship of operations; 4) representation to the public as a single, integrated enterprise; and 5) centralized control of labour relations. The Board in that case noted that no single criteria was likely to decide the issue and that the greater the degree of functional coherence and interdependence, the more probable it was that the entities would be treated as one employer. In the instant application under section 1(4) there is no doubt on the evidence before the Board that the first four criteria have been satisfied. Mr. Melo is the business in a very real sense. The numbered company was superseded by the new company for the purpose of avoiding liabilities. On all the evidence before it, the Board is satisfied that 643210 Ontario Inc. and M. Concrete Forming Limited are carrying on associated or related activities or businesses under common control or direction within the meaning of section 1(4) of the *Labour Relations Act*. Pursuant to section 1(4) the Board declares that 643210 Ontario Inc. and M. Concrete Forming Limited constitute one employer for the purposes of the *Labour Relations Act* and that 643210 Ontario Inc. and M. Concrete Forming Limited are bound by the collective agreement between the applicant and 643210 Ontario Inc. operated by M. Concrete Forming which became effective on March 1, 1989, and remains in effect until February 28, 1991.

8. The applicant also requested a declaration that there had been a sale of a business within the meaning of section 63 of the *Labour Relations Act* from 643210 Ontario Inc. operated by M. Concrete Forming to M. Concrete Forming Limited which was alleged to have taken place on or about June 1, 1990. The evidence with respect to the alleged sale was very limited and consisted of the sale of forms from one company to the other. Standing by itself the sale of forms appears to have been merely a sale of assets rather than the sale of a business. The respondents were vehicles by which Mr. Melo conducted his business. He was and is the business. The Board is not prepared to find on the limited evidence before it that there was a sale of a business within the meaning of section 63 of the *Labour Relations Act*. The request for relief under section 63 is therefore dismissed.

9. With respect to the proceeding under section 124, the evidence established that M. Concrete Forming Limited performed work covered by the collective agreement using employees who were not members of the applicant and who had not been obtained from the applicant while there were unemployed members of the applicant who were qualified and ready, willing and able to perform the work in which M. Concrete Forming Limited was engaged.

10. Article 2.01 of the collective agreement requires all employees when working in a position in the bargaining unit are required as a condition of employment to be members of the appli-

cant. Under article 2.02 M. Concrete Forming Limited is required to deduct regular monthly dues and initiation fees where applicable. Article 2.03(a) requires M. Concrete Forming Limited to call the applicant for its supply of men. By article 14.01 M. Concrete Forming Limited is required to make pension, welfare and union administration contributions or remittances as provided for under the collective agreement and Schedule "A" thereto to the trust funds designated in Schedule "A" or as designated by the applicant no later than the fifteenth day of the month following the month for which the contribution or remittance is due.

11. The evidence established that during June, July, August, September and October of 1990 M. Concrete Forming Limited employed Mr. Melo's son. In November of 1990 the son was laid off. Mr. Melo also worked and on some jobs other employees were working during this period. The son worked an average of three days a week from June 1 until November 1. Another employee named Manuel worked for 5 days during this period. In addition, since March 1, 1990, the respondents have made improper pension contributions to the applicant.

12. The money owing by M. Concrete Forming Limited with respect to the four former employees for two weeks at forty-four hours per week is three hundred and eighty-seven dollars and twenty cents. Secondly, the money owing by M. Concrete Forming Limited with respect to Manuel for five days of work the contribution is forty-eight dollars and forty cents together with wages in the amount of seven hundred and twenty-two dollars and four cents which ought to have been received by a member of the applicant together with vacation pay in the amount of fifty-seven dollars and seventy-six cents for a total of eight hundred and twenty-eight dollars and twenty cents. Thirdly, with respect to Mr. Melo's son, the amount owing is based upon three days a week or twenty-six and two fifths of an hour each week for twenty-three weeks from the beginning of June until the end of October. On these figures the contributions amount to six hundred and sixty-seven dollars and ninety-two cents. The wages which ought to have been received by a member of the applicant amount to nine thousand nine hundred and sixty-four dollars and fifteen cents together with vacation pay in the amount of seven hundred and ninety-seven dollars and thirty-two cents for a total of eleven thousand four hundred and twenty-nine dollars and thirty-nine cents. Fourthly, during March of 1990 643210 Ontario Inc. underpaid the contributions by ten cents per hour for forty-five and a half hours for an additional amount of forty-five dollars and fifty-six cents.

13. The amount owing by M. Concrete Forming Limited on its own behalf and on behalf of 643210 Ontario Inc. totals twelve thousand six hundred and ninety dollars and thirty-five cents.

14. The Board pursuant to the provisions of section 124 of the *Labour Relations Act* directs M. Concrete Forming Limited to forthwith pay to the Labourers' International Union of North America, Local 1059, the sum of twelve thousand six hundred and ninety dollars and thirty-five cents (\$12,690.35) together with interest calculated in accordance with the principles set forth in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35. The Board remains seized with respect to any issue which may arise with respect to the calculation of interest.

0153-90-R National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada (CAW - Canada), Applicant v. Novocol Pharmaceutical of Canada Inc., Respondent v. Group of Employees, Objectors

Certification - Petition - Whether petitions voluntary - Manager questioning at least one employee regarding union membership - Employer holding captive audience meetings and advising employees of possibility of "getting cards back" - Circulation of petitions and supporting activities carried on at work during working hours - Objectors failing to meet onus of establishing that petitions voluntary

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *R. W. Pirrie* and *B. L. Armstrong*.

APPEARANCES: *B. Greenstein*, *C. Meneghini*, *C. Grant* and *J. Grant* for the applicant; *W. Thornton*, *M. Sheinberg* and *D. Wirtz* for the respondent; *K. J. Neville*, *W. J. Pearl* and *P. Clayton* for the objectors.

DECISION OF THE BOARD; February 13, 1991

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The parties are in partial agreement that the bargaining units described as follows:

Bargaining Unit #1

All employees of the respondent in the City of Cambridge, save and except *maintenance and quality control supervisors*, persons above the rank of *maintenance and quality control supervisor*, office and sales staff, and persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period

and;

Bargaining Unit #2

All employees of the respondent in the City of Cambridge regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, save and except *maintenance and quality control supervisors*, persons above the rank of *maintenance and quality control supervisor*, office and sales staff.

constitute units of employees of the respondent appropriate for collective bargaining.

4. The respondent (also referred to as the "company" or the "employer") and the objectors advocate the above descriptions while the applicant (also referred to as the "union") asserts that the phrase "maintenance and quality control supervisors" ought to be replaced by the word "supervisors". Related to this dispute regarding the bargaining unit description is the applicant's assertion that two individuals, Judy Bartwick and Nady Bidiyananth, ought to be excluded from the list of employees for purposes of the count. The union argues that these individuals exercise managerial functions.
5. With respect to bargaining unit #2 and regardless of the resolution of the dispute regarding the bargaining unit description, the Board is satisfied that not more than one employee

was in the bargaining unit on the date of the application, consequently the application, insofar as it pertains to bargaining unit #2 is hereby dismissed.

6. As is indicated in a decision of the Board (somewhat differently constituted) dated May 28, 1990, there was a further dispute between the parties regarding the inclusion of six other individuals on the list of employees. In that decision, the Board consequently appointed a Labour Relations Officer to inquire into the duties and responsibilities of the eight individuals referred to and to report to the Board.

7. During the course of that inquiry the parties entered into a memorandum whereby they agreed that the five persons classified as lab persons are properly included in the unit and the one individual classified as plant clerk is properly excluded. No agreement was reached with respect to the two individuals alleged to be managerial and the Officer's inquiry followed its normal course with respect to those individuals.

8. In the interim and in accordance with the earlier Board decision, the matter was listed for hearing to inquire into the voluntariness of the statements of desire (petitions) filed in opposition to the application.

9. Hearings were held on July 10, 11, 17, 18 and 19; October 25; and November 1 and 2, 1990 during which time the Board heard the evidence of 14 witnesses.

10. At the commencement of the hearings the parties agreed that the Board should rule on the issue of whether Ms. Bartwick and Ms. Bidiyananth exercise managerial functions on the basis of the transcript of the officer's examination and that no further *viva voce* evidence would be called in relation to that issue. However, in view of the outstanding issue regarding the voluntariness of the petitions, it was also agreed that the parties would be free to call evidence and cross-examine on issues relating to employees' perceptions of the status of those two individuals. Notwithstanding that initial agreement, at the conclusion of the hearings and just prior to argument the parties requested that the Board not rule on the issue of the section 1(3)(b) challenges at this time. They also agreed that for the purposes of our determination regarding the voluntariness of the petitions we should accept that the two individuals, whether or not excluded by section 1(3)(b) of the Act, are perceived by employees to be in managerial positions. Consequently, references to "management" for the purposes of the present decision should be taken as including the two individuals whose precise status for other purposes remains in dispute.

11. Myron Sheinberg is the Vice-president, Human Resources, of Henry Shine Inc. which owns an interest of the respondent company. Mr. Sheinberg has responsibility for the respondent's employee relations. His office is in Port Washington, New York, but he visits the Cambridge plant some five to seven time per year. Apart from Nady Bidiyananth, Mr. Sheinberg was the only witness to testify on behalf of the respondent.

12. On April 17, 1990 Mr. Sheinberg received a telephone call in his New York office from Frank Milia, president of the employer, in Cambridge. Mr. Milia recounted that he had been advised by an employee (not identified in evidence) that an organizing campaign was underway. Mr. Sheinberg's response was to simply "wait and see". It was not necessary to wait very long. The following day the union delivered the following letter by fax to Karl Lashley, the company's plant manager:

I have been informed by some of your employees that members of management have been questioning workers about our organizing campaign at your establishment.

Apparently, workers have been asked directly if they have signed union cards; also, manage-

ment told the employees that in the event our organizing campaign is successful the plant will close.

As you may, or may not be aware, these tactics are in violation of the Ontario Labour Relations Act, section 64, 66 and 70. Employees have the right to make their decision as to whether or not they want to join a union, free from management interference.

I strongly urge you to advise your management to cease and desist from any further anti-union tactics.

I am monitoring the situation at your plant on a daily basis, and should your unlawful conduct continue, I will have no other choice but to file unfair labour practice charges with the Ontario Labour Relations Board.

13. Upon being apprised of the contents of this letter, Mr. Sheinberg instructed Mr. Milia to investigate the allegations it contained and determined to visit the plant the following day. In a subsequent phone conversation that same day Mr. Milia advised Mr. Sheinberg that he had met with all management employees and they had denied all allegations regarding questioning employees about union membership.

14. The following day, Thursday, April 19, 1990, Mr. Sheinberg attended at the plant. At approximately 3:30 p.m. he conducted a meeting in the production area of the plant where he addressed all the employees working the day shift. A similar meeting was held at approximately 5 p.m. for all employees working on the evening shift.

15. At the first meeting Mr. Sheinberg read out the text of the letter received from the union. He denied any allegations about closure (in fact the company had recently announced plans to expand the Cambridge Operations). He advised employees that Mr. Milia had discussed the allegations with management and had been assured that no employees had been questioned about union membership. He acknowledged that any such questioning would be illegal and asserted that it would also be contrary to company policy. He also told employees that although he was unfamiliar with Canadian labour laws, he knew that, at least in the U.S., there were ways to "ask for [signed union] cards back", suggesting that if any employees had been influenced by what he viewed as the unfounded union allegations they might wish to avail themselves of that process. We note that while there were variations in the accounts of the six witnesses who testified as to the contents of Mr. Sheinberg's address, all but one specifically recounted Mr. Sheinberg having used a phrase like "retrieving" or "getting cards back". We note the use of this phrase because on the one hand it is unusual in the sense that (even though its intent is clear) it is an inaccurate description of the manner in which employees may signify a change of heart regarding union membership; on the other hand at least two of the witnesses called by the petitioners used this very phrase to describe the object of the activities they undertook subsequent to Mr. Sheinberg's address.

16. Finally, at the first meeting, Mr. Sheinberg extended an invitation to employees. While there was conflicting evidence regarding the precise nature of the invitation, we are satisfied it was intended to solicit any information from employees which may have conflicted with Mr. Sheinberg's denial that any employees had been questioned by management regarding union membership. We are also satisfied, however, that while it may not have been Mr. Sheinberg's intention, his invitation was interpreted, at least by some employees, as an invitation to discuss ways of "getting cards back" with management.

17. Shortly after the meeting two employees, Laurie McCue and Germaine Deschamps, approached Mr. Sheinberg and advised that they had information regarding an employee who had been questioned by management. Kim Bounket, the employee in question, was summoned and

she recounted how Nady Bidiyananth had questioned her regarding whether she had signed a union card and how Ms. Bounket had acknowledged doing so.

18. Shortly after receiving this information, Mr. Sheinberg met with Ms. Bidiyananth who vehemently denied any such conversation had taken place. Mr. Sheinberg advised her that it was inappropriate for her to question employees about union membership.

19. Both Ms. Bounket and Ms. Bidiyananth testified before the Board. Ms. Bounket's version of her conversation with Ms. Bidiyananth was entirely consistent with Mr. Sheinberg's evidence regarding her account of it to him. She also testified that a fellow employee, Diane Reid, had summoned her to meet with Ms. Bidiyananth and that Ms. Reid and another employee were present when the questioning took place. When Ms. Reid testified on behalf of the objectors she did not contradict Ms. Bounket's version. On the other hand, while Ms. Bidiyananth in her evidence before the Board initially denied any conversations with any employees regarding the union, she subsequently acknowledged that the subject may have come up in a conversation with another employee but continued to deny any such conversation had taken place with Ms. Bounket.

20. For a number of reasons, including Ms. Bidiyananth's evasive and unresponsive manner during her testimony as well as the lack of any challenge to Ms. Bounket's credibility, we prefer the evidence of Ms. Bounket in relation to these events.

21. At approximately 5 p.m. on April 19th and subsequent to the events just recounted, Mr. Sheinberg held another meeting and addressed all employees working on the evening shift. The content of this address was similar to the first although Mr. Sheinberg testified that he was a little rattled by the information recently provided by Ms. Bounket and consequently his tone was not as indignant when he once again denied the union's allegations in front of the employees.

22. Mr. Sheinberg returned to New York that evening, but on his way home began to feel uneasy about the meetings held that day. He was concerned about his credibility in having denied any employees had been questioned by management in face of the information now provided by Ms. Bounket. He was concerned about his denial, to use his words, "knowing now that this person [Ms. Bounket] had been questioned". He was also concerned that the questioning which took place may not have been limited to Ms. Bounket. Consequently, Mr. Sheinberg determined to hold a further meeting of employees on Monday, April 23, the next working day at the plant. Even before Mr. Sheinberg's next meeting with employees, some initial steps towards "getting cards back" were begun.

23. Sometime early in the afternoon on Saturday, April 21st Keith Neville and William Pearl visited Art McNeil at the latter's home (all three are employees of the company). Apparently the three had had earlier discussions although there was no specific plan to meet that day. Mr. Neville and Mr. Pearl decided to make the visit because both felt Mr. McNeil was knowledgeable about how to "get their cards back". In fact when they arrived Mr. McNeil was in the process of producing a document relating to this very point. The document ultimately produced read as follows:

To Whom It May Concern

At my place of employment, Novocol Pharmaceuticals (25 Wolsley Court, Cambridge), we have a movement towards a union, for which I signed a membership card. Since then I have found that the tactics used are not above board and I wish to withdraw my support. When voicing my complaints I was told that I had to contact this office.

24. The Board was not advised which "tactics" it was that were felt not to be "above

board"; nor did we hear any evidence to suggest that any of the union's conduct during the ongoing campaign was improper.

25. Copies of the above letter were prepared for each of the three employees and each signed and mailed their own letters. Although the letters were addressed to Ministry (or Department) of Labour, Queen's Park, they all managed to find their way to the Board. In this respect we note that while the text of the letter refers to having been "told that I had to contact this office", Mr. McNeil testified that the address to which the letters were mailed was simply as a result of his presumption.

26. There were a number of developments on Monday, April 23, the next working day. Early in the day Keith Neville showed Phil Clayton, a fellow employee who was also the chief spokesperson for the objectors at the hearing, a copy of the letter produced at Mr. McNeil's house. We were not advised as to how or where this copy was made (it will be recalled that the earlier evidence was that all three copies of the letter had been mailed on the previous Saturday). The two of them revised the text of that document and prepared a draft which read as follows:

To Whom It May Concern

At my place of employment, Novocol Pharmaceutical, (25 Wolsley Court, Cambridge) we have had a movement towards a union, for which I signed a membership card. Since then, I have reconsidered the facts and now wish to withdraw my support. I no longer wish to be represented by C.A.W. local () [sic].

I was told I had to contact this office.

27. In addition, Mr. Clayton said he would find out the proper address to which this document should be sent.

28. Mr. Neville then took the draft of the new document to the office area of the plant and asked Catherine Rutt, an office employee who works in accounts receivable, if she would type a copy of the letter on her word processor. Ms. Rutt did so and provided Mr. Neville with two copies of the finished document.

29. In the interim, Mr. Sheinberg had arrived from New York for his second visit to the plant within as many working days. He arrived at approximately 10:00 a.m. and shortly afterwards spent approximately an hour on the phone with counsel reviewing events to date. Subsequent to that discussion Mr. Sheinberg instructed Mr. Milia to meet with the office and clerical staff to instruct them not to do anything for anyone involved with the union. Although the petition process had been part of his discussion with counsel, Mr. Sheinberg testified that his concern in so instructing Mr. Milia was to insure that no confidential company information (e.g. employee lists) was released in aid of the organizing campaign. He also instructed Mr. Milia to arrange a meeting of all management staff for later that day.

30. Pursuant to his instructions and approximately 45 minutes to an hour after Ms. Rutt had completed the letter for Mr. Neville, Frank Milia advised Ms. Rutt and another clerical employee that they should not do any tasks requested of them by employees. Ms. Rutt was a relatively new employee at the time and had been told by co-workers that it was a busy day, a lot was going on and the "big man" (Mr. Sheinberg) was there. In those circumstances, Ms. Rutt prepared and gave Mr. Milia a note indicating she had typed a letter for Mr. Neville. Upon inquiry Ms. Rutt told Mr. Milia that the letter had something to do with the union. Mr. Sheinberg, upon being advised, instructed that the document in question should be retrieved.

31. Consequently, Mr. Karl Lashley, the plant manager directed Mr. Neville to return the document. Mr. Neville retrieved the two copies from a locked cabinet (to which only he and Mr. Pearl, who works in the same job on the evening shift, had keys) in which they were being kept, proceeded to make at least five further copies on the company photocopier, and returned two copies of the letter to either Mr. Milia or Mr. Lashley. The document was shown to Mr. Sheinberg and although he believes it was destroyed we have no direct evidence in that regard (neither Mr. Milia nor Mr. Lashley testified in these proceedings).

32. At approximately 3 p.m. Mr. Sheinberg met with management employees and instructed them to politely decline to answer any questions from or to participate in any discussions with employees regarding the union campaign. About an hour later Mr. Sheinberg held the first of a pair of meetings (one per shift) with all employees. Again, there was some divergence in the evidence regarding the content of his address. It is clear that Mr. Sheinberg offered an apology to employees regarding previous questioning about union membership. Mr. Sheinberg's evidence was that he presented the conflicting versions he had received regarding the events and said that *if* the events had happened he apologized. The evidence of some of the union witnesses suggested that Mr. Sheinberg's apology was not conditional. The resolution of this conflict is not material for our purposes.

33. After the meeting, Mr. Neville began to solicit signatures on the newly drafted letter. He told a number of fellow employees that he had a way for them to "retrieve their cards". He met with Mr. Pearl at approximately 4:30 p.m. in their shared work area, had him sign a copy and gave him one of the blank copies of the letter. At that time he also provided Mr. Pearl with the correct address of the Board to which signed letters were to be mailed. Although the evidence was not entirely clear on the point, we can only presume that Mr. Clayton got the address by making a telephone call(s) from the workplace that day and relayed that information to Mr. Neville. Mr. Neville had previously had another employee (P3) sign a copy of the letter at the employee's work station. Several hours after completing his shift, he returned to the workplace and had Mr. McNeil sign a copy of the letter in the maintenance shop between 8 p.m. and 9 p.m. Despite the late hour, Mr. Neville testified that he brought the four signed copies he had collected of the letter (including his own) to the post office and mailed them to the Board that day.

34. On the evening shift Mr. Pearl, who had been advised by Mr. Neville that a copy of the letter was in their cabinet, used the company photocopy machine to make four additional copies of the letter. He gave three of those copies to Suzanne Powell, a fellow employee, and returned two copies (including the "original") to the cabinet. Ms. Powell met with two other employees (P6 and P22) after work and secured P6's signature at that time (although we note P6's signature is dated April 25, 1990). Ms. Powell mailed the copies signed by her and by P6 to the Board in accordance with the address Mr. Pearl had provided her. The Board also received a copy of the letter signed by P22 (who did not testify in these proceedings).

35. On Wednesday, April 25, notice of the present application was posted in the plant. Mr. Clayton testified that the posting took place at approximately 1 p.m., although the advice of posting card filed by Mr. Milia on behalf of the company indicates posting was completed at 3 p.m. Mr. Clayton read the documents posted which included some information for employees wishing to oppose the application.

36. After discussing the matter with another employee he went to the maintenance shop and drafted the following preamble to a petition:

We the employees of Novocol Pharmaceutical of Canada Inc. are opposed to the CAW-Canada

being certified. We do not want this union to represent us or have anything to do with us. April 25th, 1990.

37. Mr. Clayton made a photocopy of the petition on the office photocopier and proceeded to solicit signatures on the document. By 5 p.m. that day Mr. Clayton had collected 10 signatures (including his own) on the first document (known as petition 1). Without reviewing the details of each signature suffice it to say that all these signatures were collected in the plant during working hours and, many, at the employees' work stations. Although Mr. Clayton conceded that management personnel would regularly be in and out of the areas where signatures were collected, he testified that he did not recall seeing any management personnel present when the signatures were collected. At approximately 5 p.m. Mr. Clayton gave the photocopy of the petition preamble to Mr. Pearl who then solicited signatures on that document (subsequently labelled as "petition 2") from employees working on the evening shift. Between approximately 8 p.m. that day and 3 a.m. the following morning Mr. Pearl secured the signature of 8 employees. Again these signatures were obtained in the plant during working hours and, in many cases, at the employee's work station.

38. The following day Mr. Pearl returned the petition to Mr. Clayton who then secured the signature of one other employee in the plant. Also on that day Mr. Clayton secured the signatures of 4 additional employees to petition #1. These signatures were obtained from the employees as a group in the lab area of the plant between 3 and 4 p.m.

39. Mr. Clayton took the 2 petitions home with him and subsequently prepared a typed covering letter and list of employee signatures and filed those documents and the petitions with the Board.

40. Finally, in the chronology of events significant for our purposes, a third meeting of all employees was held on April 30 (for the afternoon shift) and on May 1st (for the day shift). While it is clear that these last meetings took place after all signatures had been obtained on all the relevant petitions (indeed, even after the petitions had been filed with the Board) we note that they took place on or before the terminal date. Further, while we do not find that anything occurred at these meetings which is dispositive of the issue currently before us, some reference to them is useful to complete the picture of the general atmosphere in the plant during the relevant period.

41. The last pair of meetings were apparently called to dispel rumours circulating to the effect that certain employees had or would receive significant cash bonuses. Mr. Sheinberg took the opportunity, however, to address certain comments regarding the union to the assembled employees. In particular he warned of the possibility of employees having to pay retroactive union dues in the event that the process of collective bargaining was prolonged. He also referred to the union constitution and warned employees of the possibility of internal union charges or even trials for persons in violation of the constitution.

42. The Board's general approach to petitions has been set out in many earlier cases including *Custom Foam Specialties Limited*, [1986] OLRB Rep. Dec. 1680 at paragraphs 8-11:

8. The object in certification proceedings is to determine whether a majority of the employees found by the Board to be appropriate for collective bargaining wish to be represented by the applicant trade union in their employment dealings with their employer. The *Labour Relations Act* provides that the certification of trade unions in this Province is based primarily upon an assessment of the trade union's membership support as evidenced by membership records filed in support of an application. The Board does not inquire into opinions about the virtues of union membership except as evidenced by that documentary membership and any timely petitions filed with respect to an application. In Ontario, as in most Canadian jurisdictions, the representation vote exists as a residual mechanism for ascertaining the wishes of bargaining

unit employees in cases where either the applicant union does not have the support of more than fifty-five percent of the bargaining unit employees which is necessary for outright certification under 7(2) of the Act (but does have the support of not less than forty-five percent of them) and where the circumstances are such that the Board sees fit to require such a vote to be held notwithstanding that there is documentary evidence showing membership support in excess of fifty-five percent. The Board's discretion in that respect must be exercised in the manner that is consistent with the Legislative primacy of the membership evidence as the means by which employee wishes with respect to certification are determined.

9. The realities of labour relations are such that the employees can and do change their views as to the desirability of trade union representation. In recognition of this, the Board has developed a procedure which recognizes the validity of union membership cards but retains flexibility to seek the confirmatory evidence of a representation vote where employees file a timely petition which indicates a change of heart.
10. Unlike union membership evidence, petitions are not directly or precisely regulated by the Act. There is no statutory definition equivalent to section 1(1)(1), nor is there any requirement that the Act of signing be confirmed either by monetary payment or otherwise. There is also no statutory declaration analogous to Form 9 (which attests to the regularity and sufficiency of membership of evidence). However, the existence of such statements is contemplated by section 103(2)(j) and 111(1) of the Act and Rule 73 of the Board's Rules of Procedure. The Board has a long established practice of accepting such petitions and exercising its discretion to order a representation vote where the petitions are voluntary and they contain a sufficient number of signatures of persons who had previously signed union membership cards to create a doubt as to the actual level of support enjoyed by the applicant trade union. The Board must be satisfied that persons indicating an apparent change of heart did so voluntarily and without being motivated by a perceived threat to their job security, a concern that the employer is involved in the petitions, or that a failure to sign could result in reprisals. It is only those bargaining unit employees who first signed union membership cards and subsequently signed petitions whose signatures are relevant to the Board's considerations. This is because employees for whom no membership evidence is filed are treated as being opposed to the application. Consequently, the signature of a non-union member on a petition can add nothing to the assessment of the support enjoyed by the union applying for certification.
11. The Board's treatment of petitions as described aforesaid has been explained in previous Board decisions (see for example, *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138 at paragraphs 15, 16 and 17). The onus of establishing that a petition is voluntary is on the employees objecting to certification. To do so, they must call witnesses to give evidence, based on personal knowledge and observation, relating to the circumstances of the origination and preparation of the petition, and the manner in which *each* signature was obtained. The cases are legion in which a failure to appear and give satisfactory firsthand evidence regarding the origination and circulation of a petition has resulted in its rejection. Each and every signature on a petition must be identified and the circumstances under which it was obtained must be recounted by a person having personal knowledge thereof. Where such evidence is not presented, the signature may, and likely will, be discounted. In addition, the circulation of petitions must be free from the actual or perceived influence of management. Consequently, the Board will discount the signature of any employee who is, or is perceived to be managerial. Similarly, where managerial personnel, or persons who are perceived as having a greater proximity to management than other employees, are involved in originating or circulating a petition, it is difficult to escape the conclusion that the employees would reasonably have perceived the petition to be supported by the employer and its reliability as a gauge of employee desires will be destroyed (see, Rule 73(5); *Radio Shack*, [1978] OLRB Rep. Nov. 1043; *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387; *Lo Food Division of Lumsden Brothers Limited*, [1983] OLRB Rep. May 676; *Markham Hydro Electric Commission*, [1984] OLRB Rep. Oct. 1481).

43. Other more specific concerns may arise where a petition is prepared and circulated in the workplace during working hours, although this fact alone is not necessarily fatal to the petition as long as the Board is otherwise satisfied that the petition filed is a voluntary expression of employee wishes (see *Packer's Dye Works and Cleaners Limited*, [1974] OLRB Rep. Dec. 859 and the cases cited therein). On the other hand, the Board has been known to observe that employees circulating petitions at work assume certain risks in respect of the manner in which such documents will be received by the Board as indicated in *Ontario Hospital Association*, [1980] OLRB Dec. 1759 at paragraph 34:

34. In the present case, many of the problems which arise could have been avoided had the sponsors of the petition found a way to poll employees away from the premises of the employer. As the Board has said, there is no "rule" preventing the circulation of a petition on company premises. The manner of circulation need not be perfect, but if the sponsors elect to proceed with the petition at their place of work, it becomes incumbent upon them to be sensitive to the impression which their activities can create in the minds of other employees. It is not unusual for petitioners appearing before the Board to point to the fact that *cards* are often signed on company premises. There is, however, a practical difference between the two situations. Persons engaging in *pro*-union activity on company premises are rarely perceived by other employees as acting with the complicity and authority of management. The same cannot be said for *anti*-union activity, and the manner of circulation therefore becomes more significant.

44. The Board has a number of concerns regarding the events just recounted.

45. First we have the questioning of a bargaining unit employee by an individual acknowledged to be perceived as managerial. This questioning regarding trade union membership occurs within the earshot of two other employees. Further, although there is no direct evidence on the point, apart from Ms. Bidiyananth's denial, the Board, perhaps not unlike Mr. Sheinberg, is not necessarily satisfied that this incident is an isolated one.

46. Next, we have captive audience meetings at which the employer advises employees of the possibility of "getting cards back" and offers an invitation apparently understood by some employees and potentially reasonably perceived by others to be an invitation to discuss the process with management. It is subsequent to that, that activities aimed at soliciting signatures in opposition to the application begin in earnest. While some cases have simply inferred a causative link between similar management intervention and the subsequent petition(s) filed (see for example *Foodex Inc.*, [1980] OLRB Rep. Apr. 414), in our case there is more concrete evidence of the link in that the precise and perhaps somewhat unusual language used by the employer to describe the process is integrated into the descriptions offered by the petitioners for their own activities.

47. Further, a number of aspects related to the actual preparation and circulation of the petitions trouble us. These emerge principally from the fact that much of the circulation and supporting activities were carried on at work and during working hours with little apparent concern. One of the petitions is prepared on a company word processor by an office employee. Mr. Clayton apparently makes long distance phone calls from work to ascertain the Board's address. The company's photocopying equipment is used at least four separate times in support of the petitioners' activities. But perhaps most significantly, signatures are solicited from employees at their work stations (in one case 10 in a period of two or four hours). While, as we have already indicated, the petitioners' evidence generally was that they did not see any management personnel present during any individual signing, it was acknowledged that management was regularly in and out of many the areas where signatures were obtained, particularly on the day shift.

48. Finally, we cannot ignore the fact that one of the petitions, although without signatures, was, however briefly, in the possession of management. Nor can we ignore the fact that no evi-

dence was heard from the management personnel (Mr. Lashley and Mr. Milia) who were primarily responsible for retrieving this document and who might have enlightened us as to the uses, if any, to which this document was put as well as its ultimate fate. In this respect we should note as well that neither are we satisfied that all of the various copies made of this document (even apart from those which were in management's possession) have been properly accounted for.

49. In the circumstances we needn't decide which, if any, of the above concerns, standing alone, would cause us to doubt the voluntariness of the petitions filed.

50. As indicated above, the mere fact that a petition is prepared and circulated on the employer's premises will not be fatal if the Board is satisfied, on a balance of probabilities, that employees would not reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of an employee's decision to sign (or not to sign) the petition (see *Radio Shack* [1978] OLRB Rep. Nov. 1043; *Morgan Adhesives of Canada Ltd.*, [1975] OLRB Rep. Nov. 813; *Lo Food Division of Lumsden Brothers Limited*, [1983] OLRB Rep. May 676). The Board is not able to draw such a conclusion in the present case.

51. The preparation and circulation of the petitions in the present case followed closely on the heels of captive audience meetings and questioning of at least one employee regarding union membership by an individual perceived as managerial. In that context employees are asked to sign petitions at their work stations and in open view in areas regularly frequented by management. In this general atmosphere and given the various concerns articulated we are simply unable to conclude, borrowing the words of the *Ontario Hospital Association* case *supra* (at paragraph 33) that the circumstances were such as would "... permit the employees to feel with some comfort that management will not be made aware of which employees in the unit supported the efforts of the petitioners, and which of the employees did not".

52. Our finding in this regard is not meant to suggest any deliberate inappropriate conduct on the part of the petitioners. We should note that the union and the objectors each filed allegations of alleged improper conduct by the other. Evidence was heard in respect of the union's allegations. The Board declined to hear evidence regarding the objectors' allegations since they were not filed in a timely fashion and, perhaps more importantly, because they related to the union's conduct in securing signatures reaffirming employee support and retracting previous signatures on petitions. The Board had determined that these subsequent revocations were not numerically relevant. In any event, in both cases we are satisfied that the conduct complained of consists essentially of the kind of puffery, propaganda and persuasion normally attendant to any organizing campaign. For the same reasons that the Board decided several years ago to eliminate the "silent period" leading up to a representation vote, we are reluctant, except in the most unusual and extreme circumstances, to enter into and regulate the debate about the merits of union organizing which takes place between employees. All this by way of saying that while we are unable to find any specific deliberate inappropriate or unlawful conduct on the part of the objectors (or the union), we must, however, conclude that, in view of the concerns we have articulated, the objectors have failed to meet the onus of establishing that the petitions are voluntary.

53. The Board is satisfied on the basis of all the evidence before it and notwithstanding the ultimate resolution of the dispute concerning the composition of the bargaining unit that more than fifty-five per cent of the employees of the respondent in bargaining unit #1, at the time the application was made, were members of the applicant on May 1, 1990, the terminal date fixed for this application and the date which the Board determines, under Section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

54. In the circumstances the Board might have exercised its discretion pursuant to section 6(2) of the Act to grant an interim certificate. However, the parties jointly requested that we limit this decision to a determination regarding the voluntariness of the petitions.

55. The Registrar is therefore directed to list this matter for hearing regarding the following outstanding issues:

- (a) the status of J. Bartwick and N. Bidiyananth; and
- (b) the composition of the bargaining unit.

56. We hope that the parties' estimation that the balance of the outstanding issues could be resolved once this decision was issued was correct and, therefore, look forward to being advised that those issues have been resolved and that no further hearing is required.

2018-87-U Ottawa Newspaper Guild, Complainant v. The Ottawa Citizen, A Division of Southam Inc., Respondent

Duty to Bargain in Good Faith - Evidence - Intimidation and Coercion - Remedies - Unfair Labour Practice - Union alleging employer contravened Act when it communicated with bargaining unit employees during negotiations - Board hearing detailed evidence concerning content of bargaining over union's objection - Board satisfied that vast majority of employer's communications not violating Act - Board ruling content of three other communications not illegal but reflecting an effort to deal with employees rather than exclusive bargaining agent and therefore violating the Act - Board issuing declaration but declining to order posting or order that employer pay costs

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *G. O. Shamanski* and *A. HersHKovitz*.

APPEARANCES: *Steve Waller, Sharlan Clark, David Elder, Pat Bell and Frederica Wilson* for the complainant; *Michael A. Hines, Ted Allan and Scott Honeyman* for the respondent.

DECISION OF KEN PETRYSHEN, VICE-CHAIR, AND BOARD MEMBER A. HERSHKOVITZ;
February 22, 1991

1. This is a section 89 complaint filed in October 1987 in which the Ottawa Newspaper Guild (the "Guild") alleges that the Ottawa Citizen, a Division of Southam Inc. (the "Citizen") contravened sections 15, 53, 54, 64, 66, 67, 70 and 79 of the *Labour Relations Act*. At the outset of the hearing, counsel for the Guild advised the Board that the Guild had elected not to pursue its allegations relating to sections 53 and 54 of the Act.

2. By letter dated January 29, 1987, the Citizen gave notice to the Guild of its desire to open negotiations early and in March 1987 the Guild sent the Citizen its notice to bargain. The 1987 negotiations covered the period from April 16, 1987, the date of the first negotiating session, to November 15, 1987 when the employees in the bargaining units represented by the Guild voted to accept an offer from the Citizen. The complaint as written alleges that the Citizen's conduct during the 1987 negotiations contravened the Act in a number of respects including the allegation that the Citizen merely engaged in "surface bargaining". On the first day of hearing, which occurred

subsequent to the acceptance by the employees of the Citizen's offer, counsel for the Guild advised the Board that the Guild would not pursue its allegations relating to "surface bargaining". What remained to be litigated essentially were the allegations that the Citizen contravened the Act in certain instances when it communicated with bargaining unit employees during the 1987 negotiations. The primary thrust of the Guild's position concerning the Citizen's written statements to employees is that they demonstrate a failure on the part of the Citizen to recognize the Guild as the bargaining agent contrary to sections 15, 64 and 67 of the Act. In addition, the Guild asserted that some of the Citizen's statements to employees also constitute contraventions of sections 66, 70 and 79 of the Act. The Guild's purpose in pursuing this complaint even though the employees accepted the Citizen's offer was to have the Board determine that the Citizen acted illegally during the 1987 negotiations, with the hope that this will have an impact on the Citizen's conduct in future bargaining. The Guild seeks declarations from the Board that the Citizen's conduct in certain respects contravened the Act, a posting order and a direction from the Board to the Citizen to pay one half of the Guild's costs of litigating this complaint.

3. The Citizen disputed the allegations that it contravened the Act when it communicated with employees during the 1987 negotiations. It was argued that this was particularly the case since the Act's provisions must be interpreted having regard to the fundamental freedom of expression in the *Canadian Charter of Rights and Freedoms*. The Citizen also took the position that the Guild was bargaining in bad faith and otherwise acted in such a manner that the Board should exercise its discretion under section 89 of the Act against providing the Guild with any relief in the circumstances even if the Board concluded that the Citizen contravened the Act.

4. It is appropriate at this point to address an evidentiary ruling which the Board was required to make very early in the proceeding. This evidentiary ruling had an impact on the scope of the evidence called and the time it took to litigate the complaint. The ruling is also related to the Guild's request for one half of its costs of litigating the complaint.

5. Written communications from the Guild and to a lesser extent from the Citizen to bargaining unit employees represented by the Guild during the 1987 negotiations was extensive. The Guild took the position at the outset that, for the most part, the relevant evidence could be restricted to the written communications. It became evident with the first Guild witness that the Citizen took the view that it was necessary to review in some detail what had occurred at the bargaining table to at least give some context to the written communications. After entertaining submissions from the parties, the Board overruled the Guild's objection to counsel for the Citizen's extensive questioning concerning what occurred at the bargaining table during cross-examination of the first Guild witness. The Board ruled orally at the hearing that this evidence was arguably relevant. The written communications, which obviously do not take place in a vacuum, arise in the context of the overall bargaining process. The majority of the written communications deal with events at the bargaining table. On at least two subsequent occasions, the Guild reiterated its view that certain details of what occurred at the bargaining table were not relevant. Since in its view the complaint took twice as long to litigate as a result of the Citizen's efforts to prolong the hearing by calling unnecessary evidence, the Guild requested the order as to costs.

6. It did take a long time to litigate this complaint. It required many days of evidence over a long period of time and the argument stage consumed four additional days. In addition to the written communications, the parties placed before us a considerable quantity of oral and documentary evidence relating to what took place at the bargaining table. In reviewing all of the evidence before us, the Board is satisfied that no fault can be attributed to the Citizen for the time it took to litigate the complaint. What occurred at the bargaining table does give some context to the entire 1987 bargaining process and it would be a rare case in which alleged improper communications to

bargaining unit employees could be viewed in isolation. How could the Board determine if an employer failed to recognize a trade union as the exclusive bargaining agent of employees without some evidence of what the employer did at the bargaining table? In this case, the details of what occurred at the bargaining table were also relevant to the Citizen's position that the Guild's conduct should cause the Board to exercise its discretion against providing the Guild with any relief. Having regard to these conclusions and for the policy reasons expressed in a number of Board decisions (see, for example, *Silknet Limited*, [1983] OLRB Rep. Nov. 1913 and *Gerald Lecuyer*, [1985] OLRB Rep. July 1099), the Board declines to award the Guild one half of its costs of litigating this complaint.

7. Before reviewing some of the relevant Board decisions and the specific allegations made by the parties, it is useful to review some of the bargaining history between the Guild and the Citizen and some general aspects of the 1987 negotiations. In determining the facts, the Board notes that it has carefully reviewed all of the oral and documentary evidence and the parties' submissions relating thereto.

8. The largest bargaining unit the Guild has at the Citizen is commonly referred to as the main unit. This unit is comprised of five departments - editorial, circulation, business office, building maintenance and printing and storage. The Guild has held bargaining rights for this unit since the 1950's, and during 1987 the number of employees in the main unit was approximately 320. Since July 1981, the Guild also held bargaining rights for the fleet control unit which consists of a small number of employees. The parties had separate collective agreements for the main unit and fleet control. In July 1987, during the course of the 1987 bargaining, the Guild was certified to represent the approximately 13 employees in the computer information services ("CIS") unit.

9. The Guild is not the only trade union to hold bargaining rights for Citizen employees. The Graphic Communication International Union represents a unit of employees and the Ottawa Typographical Union represents employees in four bargaining units at the Citizen. As one might expect, all of the trade unions familiarize themselves with the collective bargaining positions of the other unions. Prior to 1987, representatives of the trade unions would sit in on the negotiations of the other trade unions. When the Guild's bargaining committee presented its proposals to the Citizen on April 16, 1987 members of the Pressmen's and Mailers' Union were present. All of the Citizen's collective agreements apparently expire at approximately the same time.

10. The previous two sets of negotiations prior to 1987 were essentially uneventful. In both instances, the Guild's collective agreements with the Citizen were ratified prior to the expiry of the old collective agreements. The 1978 negotiations, however, did not progress so smoothly as disclosed in *The Citizen*, [1979] OLRB Rep. March 177. An issue in that case also concerned the legality of Citizen communications to employees. Although the Guild and the Citizen have a history of communicating with employees during negotiations, the communications by both of these parties to employees appear to have been more extensive in the 1987 negotiations than in previous years.

11. Ted Allan, the Citizen's Director of Personnel, acted as the Citizen's spokesperson in the 1987 negotiations with the Guild. The Citizen's bargaining team consisted of an additional five persons representing various departments. Until his retirement at the end of May 1987, J. Hanafin, an International Representative with the Newspaper Guild, acted as the spokesperson for the Guild. He was replaced by Frederica Wilson, another International Representative. In addition to the international representative, the Guild's bargaining team consisted of nine other persons, including David Elder, the President of the Guild and Chairperson of the bargaining committee, and Sharlan Clark, an Administrative Officer with the Guild since March 1987.

12. Between April 16, 1987 and November 4, 1987, the Guild and the Citizen met and negotiated on fifteen days. After providing its proposals to the Citizen, the Guild spent the first few days explaining its proposals. On May 29 the Citizen presented its first package to the Guild and on July 20 it presented its second package. During the bargaining session of August 4, the Citizen advised the Guild that it would be applying for conciliation. After spending September 1 and 2 bargaining with respect to the CIS unit, the Citizen and Guild met with a conciliator on September 8 and 9. It was during this conciliation session that the Citizen presented the Guild with its final offers for all three bargaining units. The parties met with the conciliator again on October 1. The Guild held a meeting of its members on October 18, at which time it hoped to obtain a strike mandate. At this meeting, the employees represented by the Guild did not vote in favour of strike action but they overwhelmingly rejected the Citizen's final offer and directed the Guild to return to the bargaining table. The Citizen and the Guild met in mediation on November 4 and concluded without a tentative agreement being reached. With the authorization of the Guild's bargaining committee, Frederica Wilson had further discussions with Mr. Allan, with modest success. The Guild held another meeting with employees on November 15. It initially intended to seek rejection of the Citizen's final offer and a strike vote at this meeting. However, the Guild concluded that it would not likely receive a strike mandate and at the last minute it decided to recommend acceptance of the Citizen's offer. As noted earlier, the Citizen's offer was accepted by employees at the November 15 meeting.

13. The Guild's preparation for the 1987 negotiations was quite different from the previous sets of negotiations. Prior to the commencement of bargaining, the Guild held a series of meetings with various groups of employees in order to ascertain their concerns. After it had extensive contact with its members, the Guild decided that it would make a greater effort to communicate with its members during the course of the negotiations and the evidence discloses that it succeeded in this regard. The Guild formed an action committee in order to keep the communication lines open during the negotiations between itself and its members.

14. Before negotiations commenced, the Guild decided to pursue certain objectives in the 1987 negotiations which, for the most part, had not been adopted in the previous two rounds of bargaining. The Guild wanted to bargain on a clause by clause basis rather than on a package basis preferred by the Citizen. The package approach consists of the entire proposed collective agreement being presented to the other side as a package. Discussion takes place on the various clauses in the package, but the parties do not sign off a clause if it appears they agree on it. If the other party cannot agree on the entire package, it is withdrawn and another package is presented. There is no guarantee in this process that items on which the parties appeared to agree will remain in the subsequent package. The Citizen prefers the package approach to bargaining since it takes the view that all the terms of a collective agreement have an economic impact and are interrelated. The Guild prefers the traditional clause by clause approach since it gives some certainty to the process. In the 1987 negotiations, the Guild also wanted to address non-monetary matters first before moving on to monetary items. Another primary objective of the Guild was to include the fleet control unit in the main collective agreement. Once it appeared it would obtain bargaining rights for the computer information services employees, the Guild wanted to cover these employees by the main collective agreement as well. The Guild requested and received the assistance of an international representative given the issues and approaches which it wanted to pursue in the 1987 negotiations.

15. Each party points a finger at the other in an effort to explain why the 1987 negotiations had its difficulties and why they were not concluded as quickly as in the two previous rounds. From the Citizen's perspective, the problem lay in the Guild's difficulty with package bargaining and its insistence for a long period of time in dealing with non-monetary items first and on one collective

agreement for all of the employees it represented at the Citizen in the face of clear and early indications from the Citizen of its position on these matters. The Citizen notes that once the Guild abandoned some of its approaches, the bargaining process moved relatively quickly to a conclusion. The Citizen also felt that the Guild created difficulties by not wanting to address the Citizen's agenda for change. On the other hand, the Guild was of the view that the Citizen's unwillingness to adopt the clause by clause approach in addition to its general reluctance to fully discuss proposals, caused difficulties in bargaining. The Guild also felt that the extent and nature of the Citizen's communications with employees had an impact on its role as the bargaining agent and a deleterious impact on the bargaining process. It was these respective views which gave the 1987 negotiations between these parties its own unique dynamic.

16. During the previous round of bargaining, the Guild issued three bargaining bulletins to employees. Consistent with its decision to communicate more with its members, the Guild issued twenty-six bargaining bulletins during the 1987 negotiations. These bulletins were prepared by the international representative and at least one member of the Guild's bargaining committee, and were posted on bulletin boards at the Citizen. In addition to the bargaining bulletins, the Guild also prepared a few memos directed to employees in specific departments which were either posted in those departments or handed directly to employees. From the start of conciliation in the second week of September until the Guild meeting on October 18, the Guild issued five bargaining bulletins, as well as five memos to employees in specific departments.

17. The Citizen communicated with the Guild members in writing on thirteen occasions during the course of the 1987 negotiations. Ted Allan signed the majority of these communications and had a role in drafting all of the Citizen's communications, even those he did not sign. It was usually the case that all members of the management bargaining committee would have some input. The Publisher, R. Mills, who was not on the bargaining committee, authored some of the Citizen's communications and was familiar with most of them prior to their posting. The first Citizen statement to Guild members was issued in August and the second in September. The remainder of the Citizen's statements which are of concern to the Guild were issued in October and prior to the strike vote held by the Guild on October 18. The Guild argues that it is not mere coincidence that the Citizen issued nine statements to employees in October prior to the taking of the strike vote on October 18.

18. As noted earlier, the primary thrust of the Guild's complaint concerning the Citizen's statements to Guild members is that these statements interfered with the Guild's representation of employees contrary to sections 15, 64 and 67 of the Act. In the Guild's view, the Citizen also contravened sections 66, 70 and 79 of the Act with respect to some of the statements to employees. As the Board's jurisprudence discloses, this is not the first occasion in which the Board has been called upon to decide the legality of employer communications to employees during bargaining. Before turning to the substance of the Guild's allegations, it is useful to review at some length some of this jurisprudence, as it comments usefully on the interrelationship of sections 15, 64 and 67 of the Act, the nature of the bargaining process and the extent to which the Board should supervise that process, and the importance of that feature of the Act which gives a trade union exclusive bargaining authority. This review is particularly useful having regard to the Citizen's argument concerning the *Canadian Charter of Rights and Freedoms*.

19. In *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. March 49, the Board made some useful observations about the content of the bargaining duty and the protection afforded a trade union by the Act:

13. ...

The section [section 15] imposes an obligation upon both employers and trade unions to enter into serious discussion with the shared intent to enter into a collective bargaining agreement. Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective - that of entering into a collective agreement and section 14 [now section 15] is intended to convey this obligation. But this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter into a collective agreement, the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.

14. But the preceding observations demonstrate that a very important function of section 14 [now section 15] is that of reinforcing an employer's obligation to recognize a trade union lawfully selected by employees as their bargaining agent. Certainly the freedom to join a trade union of one's choice declared in section 3 of the legislation would be but an edict "writ on water" if an employer could enter into negotiations with no intention of ever signing a collective agreement. But we believe the duty to meet and make every reasonable effort to make a collective agreement has an even more important function in a modern society that for the most part accepts that trade unions have legitimate and important roles to play. That is to say that the duty assumes that when two parties are obligated to meet each other periodically and rationally discuss their mutual problems in a way that satisfies the phrase "make every reasonable effort", they are likely to arrive at a better understanding of each other's concerns thereby enhancing the potential for a resolution of their differences without recourse to economic sanctions - the impact of which is never confined to the immediate parties of an industrial dispute. At the very least rational discussion is likely to minimize the number of problems the parties are unable to resolve without the use of economic weapons thereby focusing the parties' attention in the eleventh hour on the "true" differences between them. ...

15. Hence it is our belief that the duty described in section 14 [now section 15] has at least two principle [sic] functions. The duty reinforces the obligation of an employer to recognize the bargaining agent and, beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for "unnecessary" industrial conflict.

...

20. The following comments in *Radio Shack*, [1979] OLRB Rep. Dec. 1220 review some basic features of the Act that are relevant to the circumstances of this complaint:

63. This case merits a review of a number of basic legal principles together with consideration of their relationship to the bargaining duty. When a trade union is certified as the bargaining agent of employees in an appropriate bargaining unit under section 7 of *The Labour Relations Act*, it has the status of exclusive agent for every one of the employees in the unit so defined. It is with this organization and with this organization alone that the employer must deal once proper notice to bargain has been given. This exclusive nature of the bargaining agent's role is made clear by sections 35, 41, 42, and 59 [now sections 41, 49, 50 and 67] of *The Labour Relations Act* and by such well known cases as *John I. Case Co. v NLRB* (1941) 321 U.S. 332; *Le Syndicat Catholique des Employés de Magasins de Quebec Inv. v Le Compagnie Paquet Ltée* (1959), 18 D.L.R. (2d) 346 (S.C.C.); and *General Motors of Canada Ltd. v Brunet and U.A.W.* [1977] 2 S.C.R. 537. This exclusivity accrues despite the fact that a substantial minority of employees in a

bargaining unit were opposed to the trade union at the time the certificate was issued. Like in other systems based on the majoritarian principle, the trade union's role as the exclusive representative can be triggered by a bare majority of employees. However, once a trade union is given this privileged role, it owes an affirmative statutory obligation to represent each and every employee in the bargaining unit fairly and in good faith by virtue of sections 60 and 60a [now sections 68 and 69] of *The Labour Relations Act*.

64. The legal result of these provisions in the context of bargaining is that once a certificate is issued to a union by this Board, an employer cannot embark on negotiations with a view to rewarding or protecting those employees it believes to have opposed the trade union. Such conduct undermines the exclusive bargaining agent status of the trade union and the minority of employees are amply protected by collective bargaining realities and numerous provisions of the Act. They have the right to participate in the affairs of a trade union (section 3) and their views must be considered by the bargaining agent acting on their behalf (section 60). The collective bargaining reality is that any union representing them will require their co-operation in effecting economic sanctions against an employer if negotiations reach the impasse stage. Indeed, ongoing employee dissatisfaction ultimately can manifest itself in the form of an application for decertification. Thus, while it may be tempting for some employers to conduct bargaining with a view to fostering dissension in a bargaining unit by attempting to protect those employees who initially opposed the trade union, it is improper and in violation of the Act to do so. Such conduct interferes with the rightful choice made by the majority of the employees in the bargaining unit, and simply feeds the anxiety of those employees who, for whatever reason, had earlier doubts about the need for or viability of collective bargaining in their workplace.

65. Bargaining with the obvious view of creating and fostering dissension within a bargaining unit, is also a failure to abide by the requirements of section 14 [now section 15] which obligates trade unions and employers alike to "bargain in good faith and make every reasonable effort to make a collective agreement." On numerous occasions this Board has said that the bargaining duty fortifies the employer's obligation to recognize the duly certified bargaining agent of its employees. See generally *DeVilbiss (Canada) Limited, supra*. This means that employer conduct during the bargaining process aimed at undermining the credibility of a trade union in the eyes of the employees not only violates sections 56, 58, and 61 [now sections 64, 66 and 70], it will also amount to a failure to negotiate in good faith. Section 14 [now section 15] demands that both parties have the common intention of signing a collective agreement provided that they can reach agreement on its terms.

66. Unfortunately, because of the latter proviso, the application of this legal framework to particular cases can be difficult. The duty to recognize a trade union and to bargain in good faith does not require an employer to enter into any collective agreement proposed by a union. It is apparent from the structure and history of the legislation that the Legislature has assumed that the parties are best able to fashion the details of their relationship. The assumed strength of this approach is that labour and management are more likely to accept an employment relationship which they themselves create than one that is imposed on them. So too, their agreement is likely to be more accommodative of the economic and social demands that each faces. Accordingly, both parties are entitled to bargain hard for the agreement that they believe to be acceptable. This is so even if one of the parties has an overwhelming strength at the bargaining table and is able to achieve most or all of its needs. The exercise of such raw bargaining power in good faith does not offend the bargaining duty imposed by this Act. See *York Regional Board of Health* (1978), 18 L.A.C. (2d) 255 at 263 (Adams).

21. In *A.N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393, the Board addressed the relationship between a trade union's right to act as exclusive bargaining agent with an employer's right to express its views to employees:

18. The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 [now section 64] of the Act, prohibiting employer interference with the formation, selection or administration of a trade

union or the representation of employees by a trade union, expressly provides that this very general prohibition does not "deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence". Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union's exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56 [now section 64]. Once outside this protected area, such communications can be characterized as a violation of section 59 [now section 67] of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent.

22. As noted earlier, the negotiations between the Guild and the Citizen had its difficulties in the late 1970's. In *The Citizen*, *supra*, the Board commented on the propriety of employer communication in the context of a mature bargaining relationship:

56. Counsel's complaint about The Citizen's statements of July 19th, and the statements contained in its July 24th offer, raise again the issue of the propriety of an employer communicating directly with its employees during the course of negotiations. The question of the extent to which an employer may engage in such communications was fully canvassed by the Board in *A.N. Shaw* (*supra*). In that case the Board stated that although employers must be circumspect when communicating with their employees, especially during negotiations, not all communications between employers and employees are prohibited by the Act. Section 56 [now section 64], prohibiting employer interference with the formation, selection or administration of a trade union, or the representation of employees by a trade union, expressly provides that this very general prohibition does not "deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats or undue influence". It is only when communications between employer and employees go beyond the bounds of legitimate freedom of expression and encroach upon the union's exclusive right to bargain on behalf of its employees that they become illegal. Such communications become illegal only when they represent, "in reality", an attempt to bargain directly with employees. Direct bargaining with employees is expressly prohibited by section 59 [now section 67] of the Act.

57. In deciding whether an employer's communications to its employees can in reality be characterized as an attempt to bargain directly with them, the Board examines not only the nature of the particular communications complained of, but also the particular bargaining context in which those communications occur. Of particular importance is the timing of the communications, i.e., whether they occur early in the negotiations or late.

23. Two recent cases are worth noting. The subject of employer written communications to employees in the context of sections 15, 64 and 67 of the Act is dealt with in *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453 as follows:

42. We turn to the submission that the respondent's written and oral communications with bargaining unit employees violated sections 15, 64 and 67 of the Act. Section 64 and subsection 67(1) provide:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

67.-(1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a

collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

As with section 15, the purpose of subsection 67(1) and one of the purposes of section 64 is to reinforce both the obligation to recognize the trade union's bargaining rights and the prohibition against the use of economic power to undermine those or any other statutory rights associated with collective bargaining. As the language of section 64 reflects, these purposes can be achieved without enjoining all employer communication with employees. Nevertheless, any assessment of the scope of the freedom of expression reserved to employers by section 64 must be sensitive to the labour relations context in which it is made and must strike a balance between that freedom and the freedom to associate which these and other provisions of the Act are intended to protect (see *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) at 617). The employer's freedom to communicate with employees cannot be used to undermine the trade union's bargaining role: *Radio Shack, supra*, at paragraph 75 and *A.N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393, at paragraph 18.

43. In assessing whether employer communications during or in relation to collective bargaining go beyond the bounds of permitted speech into the realm of prohibited interference, the Board has considered whether they reflect an attempt to explain the position the employer has taken at the bargaining table or, rather, an attempt to disparage the union or its proposals. The Board looks at the context, content, accuracy and timing of employer communications in discerning their purpose and effect. Communications made after good faith bargaining has reached an impasse are less suspect than those made during early stages of bargaining, accurate statements are less suspect than inaccurate ones and, in any event, communications of explanations or positions not first fully aired at the bargaining table are highly suspect: *A.N. Shaw Restoration Ltd.*, *supra*, at paragraphs 19 to 22 and *The Citizen*, [1979] OLRB Rep. Mar. 177 at paragraphs 57 to 64; and see *Fruehauf Trailer Company of Canada Limited*, [1975] OLRB Rep. Jan. 77; *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583; *Globe and Mail*, [1982] OLRB Rep. Feb. 189.

24. One of the most recent cases to deal with the issue of an employer's written communications with its employees during bargaining is the Board's decision in *Toronto Star Newspapers Limited*, [1988] OLRB Rep. Sept. 987. After reviewing the relevant case law, the Board in that case made the following observations:

34. Since the Act expressly authorizes employers to communicate with employees, and at the same time protects the right of the employees' bargaining agent to exclusively represent employees in collective bargaining, a balance of those two often competing rights must be established. An employer clearly cannot circumvent the employees' bargaining agent by negotiating directly with its employees under the guise of communicating with employees. Nevertheless, an employer is free to explain to its employees its position with respect to the collective bargaining negotiations after having engaged in collective bargaining with the employees' bargaining agent on the matters that are the subject of the communications. The nature, timing and circumstances of such communications must all be assessed to determine whether what appears to be permissible is actually improper. ...

25. For our purposes, the above case law illustrates the legal results of sections 15, 64 and 67 of the Act. The employer is obliged to bargain with and only with the bargaining agent representing its employees. The employer is prohibited from interfering with the representation of employees, and more specifically from bargaining directly with employees, when those employees are represented by a trade union. The duty to bargain in good faith is intended to both encourage rational and informed discussion and to reinforce the obligation of the employer to recognize the bargaining agent. All of these features of the Act highlight the considerable significance of the principle of bargaining agent exclusivity. This principle is one of the key elements in the labour relations structure in this province designed to meet the objectives set out in the Act's preamble.

26. In addition to providing some insight into the duty to bargain in good faith and the sig-

nificance of the principle of bargaining agent exclusivity, the case law also addresses the subject of employer communications to employees during bargaining. As section 64 makes clear, an employer is free to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence. Apart from these specific limitations, an employer has considerable freedom to express his views to employees during the bargaining process. However, in certain instances the Board has had to balance the employer's freedom of expression with the right of the bargaining agent to exclusively represent employees in bargaining. Whether an employer has exceeded the limits of free expression is often not easy to determine and requires an examination of all of the circumstances of the communication, including its timing and its bargaining context.

27. When confronted with disputes relating to bad faith bargaining and specifically when it is required to perform the balancing exercise noted above, the Board has been careful not to insert itself extensively in the bargaining process. The following comments of the British Columbia Labour Relations Board in *Noranda Metals Industries Limited*, [1975] 1 Can. LRBR 145, which were adopted in *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583, explain the reasons for such an approach:

19. ...

Collective bargaining is not a process carried on in accordance with the Marquess of Queensbury rules, and that is especially the case when a lengthy strike is going on. Archibald Cox has warned of the long-range consequences of too close scrutiny by the Board of the tactics of negotiators:

'There is also danger that the regulation of collective bargaining procedures may cause negotiators to bargain with a view toward making the strongest record for NLRB scrutiny. The report of the Truitt negotiations bears ample evidence of the jockeying of lawyers. Hammering out a labour agreement requires all the negotiators' skill and attention. To divert them from the main task by putting a value on building up or defeating an unfair labour practice case diminishes the likelihood that the negotiations will be successful.'

Accordingly, while we interpret s. 6 as requiring adherence to certain fundamental principles of reasonable bargaining procedure, we also consider that this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement.

• • • •

The facts of this case present two important issues to the Board about the collective bargaining procedure required under s. 6 of the Code. We shall deal first with the meeting of September 5th and the letter it spawned, an incident which puts in question the propriety of direct employer communication with its employees during a strike. CAIMAW did not suggest that it is illegal, as such, for an employer to write its employees, giving its own version of the negotiations, and hoping this will ultimately influence the trade-union to draw closer to the employer position for a settlement. There was no complaint about the letters of June 28th, July 5th, and July 15th. The Union's concern was with the letter of September 5th - the letter to the employees - whose special feature was that it painted the stance of the committee in an inaccurate and disparaging way. That letter may have been defamatory. If written in the course of a representation campaign, it probably would have been a violation of s. 3(2)(f) (which was interpreted by the Board in the recent *Langley Advance* decision). However, we cannot conclude that it was a failure "to bargain collectively in good faith...and to make every reasonable effort to conclude a collective agreement". If this Board were asked to evaluate every distortion of fact or inflation of opinion contained in material written during heated collective bargaining disputes, we would be doing little else. (And we might note that if inaccurate employer letters to employees are a

violation of s. 6, then inaccurate union letters to employees might well be a violation of s. 7.) The appropriate remedy for the Noranda letter of September 5th would not be a cease and desist order under s. 8 of the Code. Rather, it was the CAIMAW response to the employees of September 5th together with the meeting of September 15th, (and subsequent events indicate that that was an efficacious remedy).

And we note as well the following similar comments in *Fruehauf Trailer Company of Canada Limited*, [1975] OLRB Rep. Jan. 77:'

14. As a general matter the Board must be very careful not to insert itself, without hesitation, into the bargaining process as a censor of the communications between parties engaged in this often emotionally charged exercise. A more intrusive approach would provoke disruptive litigation over what is essentially unavoidable human nature. Furthermore we believe that reasonable employees and diligent trade unions have little difficulty evaluating and responding to most of the isolated direct communications that may occur during collective bargaining.

28. In reviewing the allegations made by the Guild and the Citizen in this complaint, the Board has considered all of the circumstances of the communications to employees, including the content and the timing of the communications and the collective bargaining context within which they were made. In assessing the conduct of the parties during the 1987 negotiations, we have adopted the careful approach articulated in the *Noranda Metals* and *Fruehauf Trailer Company of Canada Limited* decisions referred to above. The Board does not intend to examine each of the alleged contraventions of the Act in detail. Our primary focus will be on the Guild's allegations that the Citizen's statements to employees contravened sections 15, 64 and 67 of the Act. The Board notes at this point that it has concluded that the Citizen did not contravene sections 66, 70 and 79 of the Act during the 1987 negotiations as alleged by the Guild. The basis for this latter conclusion will be addressed where appropriate later in the decision.

29. The Guild alleged that most of the Citizen's statements to employees contain aspects which contravene sections 15, 64 and 67 of the Act in that they are evidence that the Citizen did not treat the Guild as the exclusive bargaining agent of the employees. After reviewing the evidence, we are satisfied that the vast majority of the Citizen's communications to employees do not contravene the Act. Some of the examples of the Guild's allegations which we find are not contraventions of the Act can be briefly set out.

30. The negotiations broke down during the meeting of August 4 and the Citizen indicated it would be applying for conciliation. There was some discussion during the meeting about taking the Citizen's proposal to the Guild members with the Guild responding that there was nothing to take back to the employees. In a written statement to employees dated August 4, the Citizen wrote that "the Guild Bargaining Committee refused to take the Citizen's comprehensive offer for settlement to its members for a vote". Since the Citizen did not specifically request that its offer be taken for a vote, the Guild argued that the Citizen's statement is misleading. In its own bargaining bulletin dated August 4, the Guild referred to the Citizen's comment set out above and advised employees that it was untrue and why it was untrue.

31. After two days of conciliation, the Guild issued bargaining bulletin #17 to employees which was dated September 9. The Citizen responded with a statement to employees dated September 10, two parts of which concern the Guild. At one point, the Citizen noted that "The Guild committee has consistently refused to discuss any issues raised by the company and any matters that the Guild believes to be "economic" items. There is no point in continuing negotiations when only one side is ready to discuss the full range of issues necessary to reach an agreement". Further on the Citizen wrote that "the unions in the composing room, mailroom, camera plate and pressman at the Citizen have signed or ratified agreements that contain the same monetary offer and

many of the same conditions". We note that in subsequent statements to employees, the Citizen refers to the fact that it was able to successfully achieve collective agreements with the other trade unions representing Citizen employees. The Citizen asserted that these statements were in response to the Guild's direct and implicit assertions to employees that the problems in bargaining were attributable to the Citizen's bargaining strategy and its inability to bargain. The Guild contended that these comments by the Citizen were critical of the bargaining strategy adopted by the Guild and alleged that Guild's negotiators were not bargaining properly and argued that disparaging comments of this sort contravene the Act.

32. During the summer of 1987, the Guild and the Citizen discussed dates for continuing negotiations. There was a period of time in which the Guild's negotiators were unable to meet the Citizen as a result of certain commitments which the Guild's negotiators had and vacations. In a statement to employees dated October 13, the Citizen wrote that "the company's chief negotiator offered to give up part of his July holiday to try to reach agreement before the contract expired on July 20. The Guild would not come to the table because of the Guild's convention in San Diego and because the union's professional negotiator had booked holidays that month". The Citizen also wrote in that statement that "with breathtaking arrogance the Guild claims that all of the Citizen's good working conditions have been won by the Guild over the years". The Guild argued the latter statement is inaccurate and that there was no reason for the Citizen to mention the first statement so long after the event other than to make the Guild's negotiators look bad in the eyes of the employees.

33. In a Citizen statement to employees dated October 15, the Publisher wrote that: "I must stress in the strongest possible terms, however, that the Citizen will react swiftly and forcefully to any attempts to interfere with production and distribution of the newspaper. Attempts to disrupt production or distribution will be met with the firmest type of discipline, including dismissal, and the situation could escalate to the point where we would be forced to lock out the Guild. The Citizen has responsibilities to its readers, advertizers, other employees and shareholders and will continue to publish and distribute the newspaper in full throughout any labour dispute". The Guild argued that as a result of this comment by the Citizen, reasonable employees would be led to believe that they could be disciplined for engaging in legal activities, which in turn detrimentally affected its role as the bargaining agent.

34. Very early in the negotiations, the Guild and the Citizen discussed the issues of sexual harassment and payment for parking at Baxter Road. The Guild wanted some language on these issues in the collective agreement. The Citizen took the position that it did not want these matters addressed in the collective agreement. On October 1, the Citizen tabled proposals, some of which related to the sexual harassment and parking issues. In essence, the Citizen proposed that the Publisher provide a written policy on sexual harassment to all employees and a statement advising employees that the Citizen will not charge for parking at Baxter Road between September 1, 1987 and August 3, 1990. On October 15, the Publisher did issue a written statement on the Citizen's policy on sexual harassment. At the same time, the Citizen issued a statement to employees advising them that there would be no charge for parking at Baxter Road for the following five years. The Guild argued that these statements should not have been issued during negotiations and particularly just prior to the October 18 strike vote. The Guild took the position that both statements should have been first shown to the Guild for a response. The Guild also argued that by issuing these statements on October 15, the Citizen contravened the "freeze" provision in the Act.

35. The only communication from the Citizen which was not in writing occurred when D. Vali, the Office Manager, called three employees into her office. T. Garner, one of the three employees, stated that D. Vali called them into her office on the Friday before the strike vote. D.

Vali closed the door, which was unusual, and in essence, advised the employees of the importance of attending the Sunday meeting and voting. T. Garner testified that she felt Vali was interfering with her right to make her choice.

36. In considering all of the Citizen's statements to employees, particularly those referred to above, the Board has had regard to the following. The Guild and the Citizen have a mature bargaining relationship in which communication to employees by the parties during bargaining is common practice. For the most part, the Citizen's statements during 1987 negotiations were an attempt to respond to Guild bulletins. The number of Citizen statements in October and just before the October 18 strike date are attributable to the number of Guild bulletins during the same period. The Board is satisfied that the Citizen was committed to negotiating a collective agreement with the Guild and, as noted earlier, the Guild withdrew its allegation of "surface bargaining". In this broad context, the Board finds it would be adopting too intrusive an approach if it were to intervene concerning the Guild's allegations detailed above.

37. The Citizen's August 4 statement about taking the Citizen's proposal to Guild members was not entirely accurate. In its October 13 statement, the Citizen exaggerated and was inaccurate when it wrote that the Guild claimed all of the Citizen's working conditions were won by the Guild. During an emotionally charged bargaining process, such inaccurate and exaggerated statements are not entirely unexpected. By responding to statements such as these in the circumstances before us, the Board would be adopting an approach that was much too intrusive. In some of its bulletins, the Guild did attribute the state of bargaining to the Citizen's failure to fully discuss issues. It was not inappropriate for the Citizen to also comment on why it felt negotiations were proceeding in the way they were. The Citizen's statement dated September 10 wherein the Citizen indicated that the Guild was not addressing company issues and economic items, the reference to its success in negotiating collective agreements with the other bargaining agents of Citizen employees and its comment in the October 13 statement relating to the chief negotiator willing to give up part of his holiday, merely convey to employees that the Citizen was willing to negotiate and that the failure to obtain a collective agreement was because of the Guild's conduct, not the Citizen's. We note that simply because an employer's statement is disparaging does not lead to the conclusion that it contravenes the Act. In our view, reasonable employees would not conclude from the Citizen's statement dated October 15 from the Publisher that the Citizen would respond to legal conduct of employees. From the evidence, we conclude that verbal communication from D. Vali to three bargaining unit members prior to the strike vote was merely an attempt to encourage them to attend the meeting. All of these communications from the Citizen to Guild employees during bargaining do not contravene sections 15, 64 and 67 of the Act since they do not represent attempts by the Citizen to fail to recognize the Guild as the exclusive bargaining agent.

38. The Board has reached the same conclusion with respect to the issuing of the sexual harassment and parking policies on October 15. Although we have some concern with the timing of the policy statements, we note that the Citizen made its position clear to the Guild very early in the negotiations. With respect to the sexual harassment policy in particular, the Citizen took the position that it favoured issuing its policy to employees and that the subject not be a part of the Guild's collective agreement since it would be applicable to all employees of the Citizen. Although it elected not to, the mere fact that the Citizen issued the policies did not prevent the Guild from raising issues with respect to them at the bargaining table. The Board again cannot conclude that the Citizen failed to recognize the Guild as the exclusive bargaining agent when it issued the two policy statements to employees on October 15. In addition, the Board is satisfied that the Citizen did not contravene section 79 when it issued these policy statements to employees. Without canvassing the Board's extensive section 79 jurisprudence, we note that that provision is essentially designed to prohibit the alteration of terms and conditions of employment during the "freeze"

period without the trade union's consent in order to assist the bargaining process. By issuing its policy statements, the Citizen did not alter any terms or conditions of employment. The Publisher testified that all that occurred with the sexual harassment matter was that the existing policy was put in writing. The Citizen's statement on parking merely continued the existing practice for five years. In these circumstances, the Board finds that the Citizen did not contravene section 79 when it issued the sexual harassment and parking policy statements on October 15.

39. Three of the Citizen's communications to employees which the Guild alleges contravene sections 15, 64 and 67 bear closer scrutiny. The facts relevant to each of these communications can be stated briefly.

40. As noted earlier, the Guild was certified to represent the employees working for the Citizen in its CIS department during the summer of 1987. Anticipating certification for this bargaining unit, the Guild had earlier provided the Citizen with certain proposals. The Citizen took the position that it would not bargain with respect to CIS until it was legally obliged to. Upon receiving the Board's certificate, the Guild sent the Citizen a notice to bargain. Negotiations regarding CIS occurred on September 1 and 2, and while at conciliation on September 8 and 9 the Citizen provided its final offer for all three units, including CIS.

41. At the time of certification, the average rate of pay for data entry operators was slightly higher than the average rate of pay for computer operators. It appears that these are the two classifications in the CIS department. The Citizen's proposal relating to CIS treated the jobs as equal. After it spent some time reviewing these two jobs and discussing the matter with employees, the Guild determined and proposed that the computer operators be paid more than the data entry operators. The Citizen made no response to this aspect of the CIS proposal at the bargaining table other than saying no to paying those rates for the two classifications. On October 2, the Citizen issued a statement to employees which contained the following paragraphs:

.....

The Guild bargaining committee has refused to talk to us about our wage offer. But we did get an indication at conciliation about how the Guild thinks about some of the people it represents in the CIS area.

At the time that the Guild applied for certification, the average rate of pay for journeyman data entry operators was 1.5 per cent greater than the average rate of pay for journeyman computer operators. The company's proposal treated the jobs as equal.

Why now would the Guild propose to pay data entry operators between 7 and 15 per cent less than computer operators? Is it because this is now a female job class? Certainly that would be against new pay equity legislation unless it could be clearly shown that the work done was not of equal value. Or is it because the data entry operators did not sign Guild cards? Certainly that would appear to be unfair representation.

.....

During his examination-in-chief, Allan stated that the above comments "... were made, I suppose, in the heat of battle". He further testified that "looking at them now one would have to say they were an overstatement".

42. On October 8, the Citizen delivered a letter by hand to Dave Elder, President of the Guild, with copies to Guild executive board members and independent truckers. The Citizen also posted the letter on its bulletin boards for employees to review. The evidence indicates that many

employees may have read the letter shortly before Elder's or Guild's executive members received their copy. The letter reads as follows:

Dear Dave,

We are aware that you have approached independent truckers under contract to The Ottawa Citizen with the purpose of encouraging them to break their delivery contracts with the Citizen in the event of a labour dispute at this newspaper and offering them financial compensation. This is illegal.

You are hereby placed on notice that should any interference with Citizen deliveries by independent truckers occur, the Citizen intends to bring civil action against yourself, the other members of the Ottawa Newspaper Guild executive and the Guild itself for inducing breach of contract and conspiring to injure. We will seek full compensation as well as punitive and exemplary damages. These damages could run in the millions of dollars.

Yours sincerely,

Ted Allan,
Director of Personnel.

In a statement dated October 14, the Citizen again addressed the same matter as follows:

• • •

We also understand that the president of the Guild has been saying that he was "set up" by the company in his attempt to induce independent truck drivers to break their contracts with the Citizen. We doubt that anyone in the Guild is naive enough to believe such a transparent and self-serving fabrication but just in case there is doubt in anyone's mind, following is a quote from a signed and witnessed statement provided by the driver in question:

"On September 23, 1987, between 2 and 3 p.m. Dave Elder called me at my home. He said he would like to speak to me about something and asked me to meet him at the Manotick Mews. I agreed to do so and left immediately and went to the Manotick Mews which was approximately five minutes away. I met Dave Elder and we sat in the Citizen truck and talked. Dave said "If there was a strike the loose load drivers who didn't cross picket lines would be compensated by the Guild for any lost earnings." Dave would not say how much money the loose load drivers would receive from the Guild but said "it would be a hardship on all of us."

Dave also said that the Guild had a plan which would reduce circulation by 40%. Dave Elder also said any of the loose load drivers who refused to cross the picket lines would be protected because the Guild would not settle with the Citizen unless these loose load drivers were guaranteed their jobs back."

The statement indicates that the Guild president has already made extensive plans to disrupt distribution of the newspaper. (Did you know about this?) We assure everyone that the Citizen's intention to seek damages is not a groundless threat.

• • •

43. On September 30, D. Colfe, an independent trucker, signed a statement in the presence of Ted Allan, which led the Citizen to do and say what it did in the above two communications. Colfe and Elder both testified, giving quite different accounts of their conversation. As both counsel noted, it is unnecessary for the Board to determine whether Colfe or Elder testified truthfully since the issue before us concerns the Citizen's response to Colfe's statement. Before it issued the two statements, the Citizen did not speak to Elder or any representatives of the Guild. The Citizen did not raise the matter with the Guild during the conciliation meeting of October 1. Although the October 8 communication indicates an intention to sue not only Elder but also the Guild executive

and the Guild if deliveries by independent truckers were interfered with, the Citizen was not aware of whether the Guild knew of or supported Elder's alleged comments to Colfe. The Citizen issued the two statements to employees since a possible strike was close at hand and it wanted to warn employees that it would not tolerate illegal acts. Citizen witnesses testified that the statements were not designed to interfere with the bargaining process.

44. The Guild maintains that the Citizen's treatment of Elder constitutes a contravention of sections 66 and 70 of the Act. It also argues that in not discussing the matter first with the Guild, the Citizen contravened sections 15, 64 and 67 of the Act. The Guild contends that this incident should have been handled like another incident which occurred at approximately the same time. In the October 3 edition of the Citizen, an article appeared which was written by Bruce Ward, a member of the Guild bargaining committee, in which he commented on the negotiations between the Guild and the Citizen. Since one aspect of the article was inaccurate, T. Allan wrote a private letter to Ward in which he requested that a correction be posted on the Guild's bulletin boards. Within a few days, the Guild's bargaining committee did post a notice to Guild members setting the record straight.

45. The first two paragraphs of a Citizen statement to employees in the circulation department dated October 14 reads as follows:

We understand that the Guild negotiating committee has not brought to your attention the major improvement in working conditions proposed in the Citizen's final offer for settlement of a new contract.

Under our new proposal on shift hours, we are offering to treat employees in all departments the same way and to drop the provision in the current contract that allows us to work circulation employees until 9 p.m. on the day shift. This means that anyone whose shift ends after 6 p.m. would work night shift hours (35 hours per week) and be entitled to night differential. This would mean additional income, on top of the increase in pay scales, and a reduction in working hours for many people in the circulation department. We cannot understand why the Guild has not made you aware of this.

The same subject is referred to in another Citizen statement to part-time district supervisors dated October 16 which reads as follows:

The Guild negotiating committee may not have pointed out to you that city part-time district supervisors will be big winners under the Citizen's final offer for settlement of a new contract because it proposes to treat day and night shift work the same in all departments.

Under the proposal any time your shift begins before 6 a.m., as it does on Saturdays, or ends after 6 p.m., as it often does during the week, you will be entitled to a night-shift rate, based on 35 hours a week, for the entire shift. The night shift rate is calculated by dividing the weekly pay rate by 35 hours, rather than 37.5 hours, as is done now to calculate the rate for part timers.

Including the general increase of 4.8 per cent in all rates offered by the Citizen, the night shift rate in our proposal would be \$22.16 an hour at the five-year district supervisor rate. This is an increase of \$2.42 an hour or 12.3 per cent over the current five-year rate. The same percentage increase applies to all experience levels.

This is unquestionably the highest rate of increase offered to newspaper employees in Canada in recent years and only from our proposal to treat day and night shifts the same in all departments. If the offer is rejected we cannot guarantee that this will be part of whatever agreement is ultimately reached.

46. The above Citizen statements, signed by Eric Brenning, a member of the Citizen's negotiating team, clearly explain one benefit to part-time district supervisors of a Citizen proposal.

The previous collective agreement contained a provision which restricted the Citizen to a certain degree in scheduling shifts. During the 1987 negotiations, the Citizen proposed a change to the relevant clause in order to reduce its restrictive feature. The Citizen justified this alteration at the bargaining table by advising the Guild that the change would give it more flexibility and the opportunity to be more competitive. The Citizen did not indicate that it had any intention at that time of altering the shift schedules. The Guild did not agree to the proposal since it felt that any change would affect its members adversely. There is no dispute between the parties at the hearing that the Citizen's proposal would benefit the part-time district supervisors as set out in the communications signed by Brenning, as long as the hours of these employees were not changed. At the bargaining table, the Citizen did not point out this benefit of its proposal to the Guild and it, of course, did not ask the Guild to convey the benefit to the employees. Although the Citizen's proposals were posted for all employees to see, it is clear from the evidence that the Guild's negotiators were unaware of this benefit of the Citizen's proposal and this applies to those two members from the circulation department who were on the negotiating committee. The Board is satisfied that the benefit the Citizen referred to is far from obvious, since in order to appreciate the entire impact of the Citizen's proposal one would have to consider the proposal with other provisions of the collective agreement and have some knowledge about the starting and quitting times of employees.

47. The collective agreement ultimately accepted by employees did contain the Citizen's position concerning shift scheduling. The benefit referred to for part-time district supervisors in the above communications, however, were not immediately available to these employees. The reason for this is that the hours for these employees were changed effective the first Saturday after the employees accepted the Citizen's proposal. Ted Allan testified that he first became aware of this situation when R. Munk testified in this proceeding. Within two weeks of hearing Munk's evidence, the Citizen reinstated the pre-ratification scheduling procedures. The Publisher, who authored the statements signed by Brenning, testified that this action was taken since it made him look dishonest. Although the Guild disputed when the Citizen was advised about the change in scheduling procedures, the Board is satisfied from the evidence that the Publisher and Allan only became aware of the changes when Munk testified about them. Since Brenning did not testify, no reason was provided for altering the scheduling procedures immediately after the employees accepted the Citizen's proposal. It appears that the Guild called this evidence concerning what occurred after November 15 simply to complete the picture concerning the Citizen's statements dated October 14 and 16.

48. After reviewing the circumstances of the above three instances of Citizen communications to employees in the context of all the communications and bargaining during the 1987 negotiations, the Board finds that the Citizen contravened the Act when it issued its statements dated October 2, October 8 and October 16 to employees.

49. We again refer to the jurisprudence cited earlier which comments on the importance of bargaining agent exclusivity. An employer is prohibited from bargaining directly with employees and must bargain only with the bargaining agent. It is unnecessary for the Board to define with precision what constitutes bargaining. Elements of bargaining include the exchange of proposals and discussion of those proposals including the reasons why a party is in favour of or unwilling to accept a particular proposal. As the section 15 cases indicate, it is more likely that industrial conflict will be avoided if the employer and the bargaining agent engage at the bargaining table in a process where there is a full exchange between them.

50. The evidence before us concerning the circumstances of the Citizen's communications dated October 2 and 16 indicate that the Guild made a wage proposal relating to the CIS unit and the Citizen made a proposal which would give it greater flexibility in scheduling shifts. One would

expect that anything either party wanted to say about these proposals would first be said to the other party at the bargaining table. After saying very little at the bargaining table about the Guild's CIS monetary proposal, except to say "no" to it, the Citizen, in its October 2 communication, in effect suggests to employees that the Guild is discriminating against data entry operators contrary to the pay equity legislation or because they did not sign Guild cards, which would contravene the unfair representation provision in the Act. Such questions should have been first asked of the Guild, the exclusive bargaining agent, at the bargaining table. The Citizen advocated the shift scheduling proposal by only indicating that it would provide it with greater flexibility. The Citizen did not attempt to sell its proposal to the Guild by directing its attention to how the part-time district supervisors would benefit from it. As noted earlier, such a benefit was far from obvious. Rather, the Citizen pointed out the benefit to employees and wondered why the Guild had not brought it to their attention. By raising these issues first with the employees instead of with the Guild at the bargaining table the Citizen engaged in bargaining with employees contrary to section 67 of the Act. Such conduct also contravened sections 15 and 64 of the Act.

51. In communicating with employees concerning the "Elder incident" prior to raising the matter with the Guild, the Citizen contravened sections 15 and 64 of the Act. What economic sanctions may be employed during a labour dispute is very central to the bargaining relationship. Without raising the incident with Elder or the Guild, the Citizen elected to bring the incident to the attention of employees, threatening civil action in circumstances where the Citizen was unaware of what position the Guild might take concerning the incident. In the circumstances, the Citizen was obliged to first discuss the matter with the Guild. Although the Citizen's handling of the Elder incident is somewhat troubling, the evidence does not support the conclusion that the Citizen also contravened sections 66 and 70 of the Act.

52. As noted earlier, the Citizen argued that in interpreting the relevant statutory provisions in the *Labour Relations Act* in order to assess the legality of the Citizen's communications to employees, the Board was obliged to interpret the provisions in a manner consistent with the *Charter's* guarantee of freedom of expression. In counsel's submission, given the guarantee of freedom of expression in section 2(b) of the *Charter*, the Citizen's communications to employees did not contravene the *Labour Relations Act*. Counsel for the Citizen and the Guild devoted a considerable amount of time in argument to the *Charter* issue providing an excellent review of the jurisprudence and how it should be applied in this case. However, we do not find it necessary to review these submissions.

53. As noted earlier, the Board's general approach to complaints concerning bargaining conduct is to leave the bargaining process at the bargaining table and not to actively intervene in the process. In addition, the Board does interpret the Act's provisions in light of the guarantee of freedom of expression in the *Charter* and the specific requirement contained in section 64 of the Act. Employers do have considerable freedom to express their views apart from the specific prohibitions contained in section 64. In this case, most of the Citizen's communications to employees did not contravene the Act. In those few instances where we have found that the Citizen has contravened the Act, the Board has not found the content of the communications to be illegal. What makes them illegal in this case is that they reflect an effort to deal with employees rather than the exclusive bargaining agent of those employees. As discussed earlier, the Board's approach is to balance the freedom of expression of an employer with the significant principle in the Act of bargaining agent exclusivity. It is this principle which is one of the primary features of the labour relations structure in this Province designed to provide "harmonious relations between employers and employees". The result of the balancing exercise very much depends on the facts of a particular case. The Board is prepared to assume that the result of the balancing exercise may infringe on the

freedom of expression. However, the limits imposed on the freedom of expression is a reasonable limit in accordance with section 1 of the *Charter*.

54. We have reviewed the submissions of counsel for the Citizen to the effect that we should exercise our discretion to deny the Guild any relief having regard to certain aspects of the Guild's conduct during the 1987 negotiations. The Board does not find that the Guild bargained in bad faith or acted in a manner which should disentitle it to declaratory relief.

55. The Board noted earlier that it would not order the Citizen to pay one half of the Guild's costs of litigating this complaint. Given the mature bargaining relationship, the Board is not convinced that it is appropriate in the circumstances to direct the Citizen to post the Board's usual notice to employees. Accordingly, having regard to the evidence and submissions, the Board declares that during the 1987 negotiations, the Citizen contravened sections 15, 64 and 67 of the *Labour Relations Act* when it issued its communications to employees dated October 2 and 16, and also declares that the Citizen contravened sections 15 and 64 of the Act when it issued its communication to employees dated October 8.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; February 22, 1991

1. I dissent with respect to the majority decision with regards to the Citizen's communications dated October 2-8 and 16th.
2. In my view these communications by the company did not contravene the provisions of Section 15-64-67 of the Act. I would characterize these communications purely as informational parallel to the other communications issued to their employees during negotiations.
3. I would have dismissed the Guild's complaint.

0808-89-R Labourers' International Union of North America, Local 506, Applicant v. Pre-Eng Contracting Ltd., Respondent

Bargaining Unit - Certification - Construction Industry Employee - Parties disputing number and identity of employees to be included in bargaining unit for purposes of section 71(1) of the Act - Board finding first individual neither exercising managerial functions nor employed in bargaining unit for majority of time on application date - Board finding second individual employed in bargaining unit for majority of time on application date and included in unit for purposes of the count - Certificate issuing

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballentine*.

APPEARANCES: *Elizabeth Mitchell* and *Peter Treacy* for the applicant; *Douglas Gilbert*, *Bruno Scenna* and *Mona Anis* for the respondent.

DECISION OF THE BOARD; February 28, 1991

1. In this application for certification the applicant filed three combination applications for membership and receipts. The combination applications for membership are signed by the employ-

ees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

2. The respondent filed a reply, a list of employees containing six names on Schedule "A" and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.

4. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

5. The Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

6. The pleadings filed by the parties revealed a dispute about the number of employees who would be included in the bargaining unit for purposes of subsection 7(1) of the Act. Subsection 7(1) requires the Board to "...ascertain the number of employees in the bargaining unit at the time the application was made...". The declaration filed by the applicant pursuant to the Board's Rules of Procedure in support of its membership evidence claimed that there were three employees in the unit. The list of employees filed by Pre-Eng Contracting Ltd. ("the employer" or "the respondent") contained six names. Accordingly, a different panel of the Board authorized a Board officer to inquire into and report to the Board on the list of employees who would be included in the unit described above. The officer's inquiry was made during three days approximately one and

one-half to two months after the application date. Once the officer's report to the Board was released to the parties, they requested to make oral submissions as to the conclusions the Board should reach based on the evidence contained in the report. A hearing was held for that purpose.

7. The six persons named on the employer's list were: Frank J. Grotsch, John Jeronimo, Joseph L. Lefevre, Steven C. Long, Sam Rodriguez and Stephen Small. The applicant claimed that Grotsch, Lefevre and Long should not be included in the unit because on the date of application Grotsch was not working within the unit, Lefevre and Long exercised managerial functions within the meaning of subsection 1(3)(b) of the Act or, in the alternative, if the Board were to find that Lefevre did not exercise managerial functions, he was not working within the unit. During the course of her submissions to the Board, applicant counsel conceded that Steven Long should be included in the unit and the Board so finds. Consequently, the persons remaining in dispute are Frank Grotsch and Joseph Lefevre.

8. The officer's report contains the evidence of Frank Grotsch, Joseph Lefevre, John Jeronimo, Sam Rodriguez, Stephen Small, Peter Treacy, Kenneth Bloomfield and Max Stanford. Grotsch and Lefevre were called by the Board and examined by the officer and the parties. Jeronimo, Rodriguez, Small and Treacy testified for the applicant and Bloomfield and Stanford for the employer. They were examined by the parties. There is significant conflict in the testimony of several witnesses as well as internal inconsistencies in the testimony of some. Conflicts and inconsistencies in the evidence about the work being performed on the date of making of the application and who was performing it are dealt with later in the decision. Where it has been necessary for the Board to resolve other conflicts and inconsistencies, it has taken into account what a witness' answers to questions reveal about the witness' opportunity for knowledge of the matters about which he was testifying, the firmness of his recollection, his ability to relate that knowledge clearly, the directness of his responses, the submissions of the parties and what is reasonably probable in all of the circumstances.

9. The officer's report also contains documentary evidence in the form of daily labour time sheets for the two sites including June 23rd, a Superintendent Daily Report for the St. James Town site for June 23rd and Environment Canada meteorological records of readings for the month of June for "Toronto City" taken at the University of Toronto station. They were submitted to the Board after the conclusion of the inquiry by counsel who had represented the employer at the inquiry. They were accompanied by a copy of a letter addressed to applicant counsel. The letter refers to employer counsel having announced her intention at the conclusion of the inquiry to introduce the reports into evidence. There was no objection to their introduction in this manner. Nor was there any objection when employer counsel relied on them in his oral submissions to the Board at the hearing held to receive the parties' submissions on the officer's report. The time sheets record the total hours worked on each day of a work week by individual employees and allocate those hours to particular tasks. The time sheets are an accurate record of the total hours worked by hourly paid employees because they are relied upon for payroll purposes. Their allocation of hours to specific tasks, however, is made for costing purposes and may not be an accurate record of the work which an employee was actually doing on that day. Also, for Lefevre and Grotsch who are paid a salary regardless of their hours worked, they are not a reliable record of the exact hours worked by them. For example, while Bloomfield said that he would not show time for Lefevre or Grotsch on a particular day if they had not worked on the St. James Town site, on any day when they were on site, he might not be precise about their actual hours worked. According to Bloomfield, their hours are recorded for costing purposes only and, since they are going to be working no matter which site they are on on any particular day, it does not matter whether they work on one site or the other. In these circumstances, the time sheets are not conclusive with respect to the actual work performed by the employees recorded on the sheet and they do not

accurately record the actual hours worked by Lefevre and Grotsch. The Superintendent Daily Report is a general record of significant work activities of the respondent's employees and subcontractors and of the conditions on the site. Bloomfield prepares a report for each day.

10. In an application for certification under the construction industry part of the Act, in order for a person to be included in the bargaining unit for purposes of subsection 7(1), the person must be at work for the employer on the date the application is made and have spent the majority of his/her time on that date doing bargaining unit work. See *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41, at paragraph 12 and the cases referred to therein. Paragraph 23 of the decision sets out the following criteria to be used:

- (a) whether the person was employed by the respondent and at work on the date of application; and
- (b) if so, the work that that person spent the majority of his/her time doing on the date of application or
- (c) where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

Applicant counsel submits, and the Board agrees, that these are the correct tests to apply in deciding whether Grotsch and Lefevre should be included in the bargaining unit for purposes of the subsection 7(1) "count". Counsel for the employer did not expressly agree with the application of those criteria but the thrust of his argument adopts them by implication.

11. This application was made on June 23, 1989. On that date, the respondent was engaged in work on two construction sites within Metropolitan Toronto. They were referred to as the Health and Welfare project located in the area of Midland Avenue and Highway 401 and the St. James Town project in the vicinity of Bloor Street East and Parliament Street in the City of Toronto. The Health and Welfare project involved the demolition of interior walls of a building. The St. James Town project was a contract for the rehabilitation of a concrete roof slab of an underground parking garage, including waterproofing, new landscaping and lighting. As of June 23rd, Max Stanford, one of three partners who own the respondent, was general superintendent of the projects, Ken Bloomfield was project superintendent at St. James Town and George Patton was project superintendent at Health and Welfare.

12. The issue of whether Lefevre exercises managerial functions arises because subsection 1(3)(b) of the Act provides that no person who, in the Board's opinion, exercises managerial functions, shall be deemed to be an employee under the Act. Thus such persons are excluded from any unit of employees which the Board may find to be appropriate for purposes of collective bargaining. As a matter of practice, in applications for certification, the Board excludes all persons employed at and above the lowest level at which managerial functions are exercised. In applications for certification in the construction industry, this exclusion is consistently expressed as "non-working foremen and persons above the rank of non-working foreman". The corollary of that exclusion is that persons who are commonly referred to as "working foremen", because they exercise some supervision over other employees while doing the same kind of work themselves, are not excluded unless they have overall responsibility for a job site or can and do affect the employment relationship of the employees whom they supervise. See *Seegmiller, supra*, at paragraph 13.

13. Lefevre has worked in construction for 15 years, primarily in concrete construction. He was hired by the respondent in March 1989 and there is no doubt that one reason why he was hired was his knowledge of concrete construction and its application to the work on the St. James Town

project. He also knew other persons who were experienced in concrete construction. He stated that the respondent's owners wanted to get into concrete restoration work and expected him to be on-site overseeing the jobs and at the same time helping to do the work. He was hired at a salary of \$40,000 per year. He asked for that form of payment, declining to be paid at an equivalent hourly rate. No hours of work were stipulated and no job title was discussed. When asked by the Board officer what was his classification, he replied that he had not been given one and he guessed that the closest label he could give himself was "labour foreman".

14. Lefevre was hired before the St. James Town site was open so he worked at other sites for the respondent and did preparatory work for the opening of the St. James Town site. It opened at the beginning of May and Lefevre was the only person regularly on site who supervised the employees. He worked under the direction of one of the owners. Bloomfield did not return from an extended vacation until mid-May. During this period Lefevre ran a labour crew of from two to twelve employees involved in the placing of hoarding and safety fences and the removal of trees prior to excavating the earth overburden on the roof slab. Sometimes Lefevre worked as part of the crew and other times he worked in the site office. Although the evidence is unclear as to the precise division of his time between working with the crew, supervising them and working in the site office, Lefevre's testimony contains a number of references to him working with the labourers on the preparatory work and of doing the work himself; for example, cutting down and removing the trees. He also spent some of his time doing demolition work for the respondent at the Health and Welfare site. Grotsch testified that Lefevre directed the employees cutting down trees, putting up hoarding and helping them with those jobs.

15. Even if the Board was prepared to assume, because he was responsible for the St. James Town site prior to Bloomfield's arrival in mid-May, that Lefevre exercised managerial functions at the time, he ceased exercising them once Bloomfield joined the St. James Town project in mid-May, about five weeks prior to this application. Bloomfield was made responsible for the project, including the concrete work, in spite of the fact that Lefevre had been hired for his experience with concrete construction. The fact that Bloomfield was responsible for that work is demonstrated by the attempt, described later in the decision, to remove the waterproof membrane from the roof slab by using a piece of equipment referred to as a Bobcat. Bloomfield proposed this method. Lefevre disagreed with his proposal. The owners agreed with Bloomfield and purchased the Bobcat for \$20,000 for that specific purpose. Bloomfield had direct control over the respondent's work force, including the labour crew. He hired labourers. Rodriguez was the first labourer hired after Bloomfield joined the project. Rodriguez applied at the site for employment and Bloomfield interviewed him in the site office. Lefevre was present during the interview but his only input into the decision to hire Rodriguez was a positive comment about his physique. Bloomfield hired other labourers after Rodriguez but did not seek Lefevre's opinion on them. Bloomfield, not Lefevre, had direct responsibility for discipline, granting time off, scheduling overtime, deciding whether an employee could take vacation time off and assessing employees' performances.

16. On the other hand, Bloomfield clearly expected Lefevre to direct the work of other labourers and, in fact, was critical of him for refusing a request to assign some work to new employees and show them how to do it. Bloomfield's response was to assign the task to Grotsch whom Bloomfield referred to as his working foreman, describing his duties as follows:

He works with the tools and every morning I give him a list of items to go through and areas of importance to get ready for subcontractors coming into that area and he takes [the list] and the men out and does the work.

That is a fairly representative description of a working foreman's function, directing a crew and working "at the tools" with them to accomplish particular work tasks. Grotsch and other witnesses

described Lefevre as doing labourers' work like them and directing them in the performance of the work. Grotsch estimated Lefevre to spend about a third of his on-site time at St. James Town directing labourers work. In June when there were only two or three labourers working on the site, Grotsch described Lefevre as doing mostly labouring work. The description of Lefevre doing and directing labourers' work is consistent with Stanford's view of Lefevre's role on the St. James Town site. In cross-examination, Stanford agreed that Steven Long could be described as labour foreman of the Health and Welfare site and, when asked whether Long directed other employees, Stanford's response was that Long would be given a task to do and either do it himself or take a couple of employees with him and perform the tasks. When asked who was Long's counterpart on the St. James Town site, he replied that Lefevre was.

17. On balance, the Board is satisfied that Lefevre's responsibility for directing and controlling other employees at the time material to this application was no higher than that of a working foreman. While he was responsible also for identifying materials and equipment required for the concrete and demolition work and recommending prices and suppliers to Bloomfield, those responsibilities have no direct bearing on his direction and control of other employees. Nor does the fact that Lefevre was paid a salary of \$40,000 per year, and not an hourly wage, detract from the Board's conclusion that he was nothing more than a working foreman. Lefevre rejected an hourly wage and asked for a salary instead. While no hours of work were stipulated for that salary, the least daily hours recorded for him on the daily time sheets in evidence are eight and one-half. For those hours, his salary would be the equivalent of approximately \$18.00 per hour. His condition is little different than that of Grotsch's who was hired at a salary of \$39,000 per year. Rather their salaries reflect the respondent's recognition of the value of their concrete construction experience to its attempt to get into the concrete restoration business and the fact that they were employed elsewhere at the time the respondent hired them. In the Board's opinion, therefore, Joe Lefevre does not exercise managerial functions and should not be excluded from the bargaining unit pursuant to subsection 1(3)(b) of the Act.

18. That leaves the issue of whether Lefevre and Grotsch, or either of them, were employed in the bargaining unit on June 23rd. There is substantial conflict in the evidence about what work was being performed on June 23rd and what Lefevre and Grotsch were doing on that day. Lefevre at first recalled that he was at the St. James Town site where he had the labourers chipping and repairing areas of the roof slab and putting up hoarding. Later, however, he admitted that chipping did not start until early July. He relates that work with a visit to the site made by officers of the applicant. The parties agree that the evidence shows that visit to have been on July 5th.

19. Grotsch's evidence was that he and Lefevre worked on placing hoarding that morning until about noon. The hoarding used on the site was described by Bloomfield as a type of safety fence made by driving steel T-stakes into the ground, attaching 2x4's, 12 feet long, to the stakes and suspending rolls of plastic fencing from the 2x4's and stakes. Erecting the fences involves minimal nailing. After lunch Grotsch operated a piece of equipment he and others referred to as a Bobcat. That is a trade name for a rubber-tired, skid-steer loader and backhoe. He operated the Bobcat until 4:30 p.m. and then worked another half-hour to finish the hoarding. The Bobcat was being used as part of an experiment in removing a waterproof membrane from the roof slab. Bloomfield was directing the work and two of the owners were present to observe it. The membrane had to be removed before the chipping and restoration work could begin. According to Grotsch, while he was operating the Bobcat, Rodriguez was working on some areas of the roof trying to remove the membrane with an ice scraper. Grotsch also tried removing the membrane by hand in some areas for 15 or 20 minutes while Bloomfield operated the Bobcat. When Grotsch was asked why he was able to be so specific about what he was doing on June 23rd, he related it to the

site visit by two officials of the applicant whom he recalls talking with Lefevre on the roof slab. That is the visit which the parties agree took place on July 5th.

20. Rodriguez, on the other hand, said that he worked most of June 23rd cleaning mud off the street and sidewalk at the site entrance. This was necessary, he said, because it was raining enough for him to get wet and the tires on trucks removing soil from the site were making the sidewalk and street muddy. He testified that he spent about five hours on that work and the rest of the day working on hoarding and other work. He remembers the 23rd as the same day when two representatives of the applicant stopped by the site and spoke with him while he was cleaning the street. This is not the same visit which the parties agree took place on July 5th. He also testified that he and Bloomfield were the only employees on site that day. According to Rodriguez, that was not the only time in June when he and Bloomfield were the respondent's only employees on the St. James Town site. He testified in chief that he and Bloomfield were the only employees on site during the last one and one-half weeks of the month. Then on further questioning about the removal of soil from the site, he testified that trucks were hauling soil all month and he was the only employee (besides Bloomfield) of the respondent on the site while that work was being done. Hauling was being done by subcontract, not by the respondent. In cross-examination he denied the latter testimony and reiterated that he and Bloomfield were the only employees on the site for one and a half weeks. On further challenge, he testified that, except for Lefevre and Grotsch coming on site a few times, Bloomfield and he were the only employees on site while soil was being hauled and, when Lefevre and Grotsch were there, they worked occasionally, but mostly argued about how to remove the waterproof membrane and about the Bobcat being used for that purpose.

21. Rodriguez does recall the Bobcat being used to try and remove the membrane, but not on June 23rd. He also recalls two of the owners being on site when it was used and that the Bobcat's bucket had been filled with concrete. He cannot recall the date, although he thinks that the owners came to the site before June 23rd to watch the experiment. Only he, Bloomfield and the two owners were there and Bloomfield operated the Bobcat. He said that Lefevre was not there and he could not recall Grotsch being there.

22. Peter Treacy was one of the two representatives who stopped and talked with Rodriguez when he was cleaning the street. His evidence corroborates that of Rodriguez respecting the date, June 23rd, the weather and the cleaning of the street. He asked Rodriguez to remember what he was doing that day. It is reasonable to infer from that instruction that Treacy was checking the job sites in order to see who was at work before filing the application. In the Board's experience, organizers for construction trades unions commonly follow that practice. Treacy did not go on the site and could see very little of it from the street. He had visited the Health and Welfare site first, around 9:30 a.m. and returned to it briefly some time after 1:00 p.m. He did not go on site either time. He testified that he saw Lefevre, Small and Jeronimo at the site on his first visit. He saw the three of them talking and then saw Lefevre go into a trailer. In cross-examination he admitted that he saw Lefevre for the first time at the officer's examination. Prior to that he knew of him only by the description of the other employees. When asked what the weather was like when he visited the two sites, he stated that it had not been raining on his first visit to the Health and Welfare site but it was drizzling when he spoke to Rodriguez at the St. James Town site around 11:00 a.m. It was still drizzling when he returned to the Health and Welfare site some time after 1:00 p.m. By 1:30 p.m. he had left that site to attend to an unrelated matter nearby. When asked again what the weather was like for the rest of the day, he described it in the following terms:

"It was a lousy day. It wasn't really raining hard, but it was just a lousy, rotten day. Overcast."

23. Small remembered June 23rd as a Friday. He placed Lefevre at the Health and Welfare site that day stating that Lefevre was there in the morning when Small started at 7:30 a.m. and

again at the end of the day when Small left with Lefevre. He testified that Lefevre helped Small and Jeronimo clean up debris in one of the laboratories for a while and then returned to the respondent's site office, after which Lefevre checked occasionally to see what they were doing and whether they needed help. Small also saw Lefevre on breaks. He conceded that it was possible for Lefevre to have left the site without Small seeing him. He testified that he was able to recall the events on June 23rd because he understood that the applicant was going to do whatever was necessary to "sign up" the respondent that day. He had been told previously that the applicant had signed up the respondent on Wednesday (June 21st), but Jeronimo had not been there and, as a result, he and Jeronimo had talked all day on June 23rd about "what we should do".

24. Bloomfield testified that Lefevre, Grotsch and Rodriguez were all at work on the St. James Town site on June 23rd. He recalls that the afternoon was spent unsuccessfully experimenting with the removal of the waterproof membrane using the Bobcat. Grotsch operated the Bobcat except for a very brief period when Bloomfield took over. He places Rodriguez trying to remove the membrane from different areas of the slab using an ice scraper. He remembers the experiment with the Bobcat because he had arranged to have its bucket filled with concrete on June 21st to see if adding weight might help the operation and had tried it out on June 22nd, also without success. The Bobcat had been bought by the respondent for \$20,000 on Bloomfield's recommendation that it be used for removing the waterproof membrane. He said it had been used successfully to remove membrane from another area of the slab, but when it did not work on other areas on June 22nd, he asked the owners to come to the site the next day for a demonstration and to review the process. Bloomfield was confronted in cross-examination with a document which he described as a delivery slip for a delivery of concrete on June 21st on which he had noted that some of the concrete was poured into the Bobcat bucket. Bloomfield also testified in cross-examination that the weather on June 23rd had been overcast in the morning, without rain, and sunny from noon on. Upon being challenged in cross-examination that it had drizzled in the morning of June 23rd, Bloomfield replied that he had no recollection of it raining that day, but it had rained so substantially the day before that they were still mopping up on June 23rd. When asked to concede that it could have been drizzling in the morning even if he had no recollection of it doing so, he reiterated that he had no recollection of it drizzling or raining that day and that it was overcast (in the morning) and sunny in the afternoon.

25. The June 23rd time sheet for the St. James Town site records 8 1/2 hours worked for each of Lefevre, Grotsch and Rodriguez. Lefevre's and Grotsch's time is distributed to de-watering the site, 3 1/2 hours, and to removal of the waterproof membrane, 5 hours. Rodriguez' time is distributed to hoarding repairs, 1 1/2 hours, and to the removal of the waterproof membrane, 7 hours. The June 23rd time sheet for the Health and Welfare site records 8 1/2 hours worked for each of Long, Small and Jeronimo, all on demolition work. While Lefevre's name does not appear for June 23rd on the time sheet for the Health and Welfare site, it is on it for June 20th and June 21st for eight and one-half and nine and one-half hours respectively. The St. James Town site time sheet also records him for those two days at nine hours each day. Bloomfield made out the time sheet for St. James Town. Patton, his counterpart at the Health and Welfare site, usually prepares it for that site. On June 19, 20 and 21, however, Steven Long prepared it. When Stanford checked over the time sheet for June 20th, he added Lefevre's name and hours because Stanford had visited the site briefly that day and thought that he had seen Lefevre there. Stanford had visited several job sites that day and admitted that he could have been mistaken. There was no satisfactory explanation for Lefevre's name appearing on that same time sheet for June 21st. With respect to June 23rd, according to Stanford who was on the Health and Welfare site that day, Lefevre did not work there on June 23rd. With respect to Small's evidence that Jeronimo was not on the Health and Welfare site on June 21st, the Board notes that the time sheet records Jeronimo as having worked for eight and one-half hours at the site that day, but no time is shown for him on June 20th. Thus,

it would appear that Small was correct about Jeronimo being absent one day that week, but not about the date of absence.

26. The Superintendent Daily Record for June 23rd records a high temperature for the day of 26 degrees Celsius and the weather overcast followed by a sunny afternoon with no report of rain. The report indicates that Bloomfield and two labourers were on site, that a rubber-tired backhoe was used and work activity for the respondent's employees included site de-watering, hoarding repairs and removal of waterproof membrane. Bloomfield was challenged in cross-examination about the discrepancy between the Superintendent Daily Report, which recorded two labourers on site on June 23rd, and the time sheet, which lists Lefevre, Grotsch and Rodriguez. He replied that the Report was incorrect in that respect and, as well, the Report was not intended to cover all activities of the day. It was intended only to provide a brief overview of the major activities, the subcontractors on site and the equipment in use.

27. The meteorological records for June 23rd show seven consecutive hours of sunshine beginning at 11:00 a.m., a high temperature of 26.2 degrees Celsius and no rainfall. By contrast, on June 19th there were seven consecutive hours of sunshine beginning at 7:00 a.m. and approximately one-third of an inch of rain; on June 20th there was no sunshine and minimal rainfall; on June 21st (Wednesday) there was no sunshine and significant rainfall of approximately three-quarters of an inch; and, on June 22nd no sunshine and minimal rainfall.

28. The problem for the Board is to extract from the conflicting evidence of the witnesses a coherent story about what work was being done on the St. James Town site on June 23rd, whether the work was work of the bargaining unit and, if it was, whether Lefevre and Grotsch, or either of them performed such work for the majority of the time on that day. Clearly there are problems with the testimony of most of the witnesses respecting the work being done at the St. James Town site and who was doing it, whether internal inconsistencies or conflicts with the testimony of other witnesses.

29. It is not possible to reconcile each inconsistency and conflict in the evidence. The Board can appreciate and understand why witnesses might have difficulty recalling with any precision or detail what they were doing on a day which otherwise had no significance for them. There are, however, two particular aspects of the evidence from which the Board can find some guidance. First, there are the reasons offered by witnesses for remembering June 23rd. Treacy, Rodriguez, Small and Bloomfield had better reasons than others for remembering what work was being done by whom on June 23rd. For Treacy, it was because June 23rd was the day on which he made this application and he was checking who was at work on the two projects. For Rodriguez, it could have been Treacy's instruction to him to remember what he and others were doing on that day at the St. James Town project. However, if it did aid his recall, Rodriguez did not offer that reason when he was queried about why he could recall what he was doing that day. For Small, it was because he believed that June 23rd was to be the day when the union was going to "sign up" the employer. While Small was not asked what he meant by signing up the employer, it is reasonable to infer that he was referring to Treacy making the application for certification. He related that event to an earlier attempt which he had been told had been made earlier in the week on a day when Jeronimo was not at work. He may have been confused about what day that was, but his evidence that he had seen Lefevre on the Health and Welfare site at the beginning and end of the day on June 23rd, and from time to time during the day, was consistent throughout his examination. He was the only witness who remembered with any degree of certainty that June 23rd had been a Friday. Bloomfield's reasons for remembering the day relate to his responsibilities as project superintendent at the site. He held overall responsibility for the St. James Town project, including keeping the costs within estimates. He kept records of what went on each day. On his recommen-

dation, the respondent had paid \$20,000 for the Bobcat to be used for removal of the waterproof membrane and the most recent trial had been unsuccessful. Second, there are the weather conditions existing on June 23rd as reported in the Environment Canada meteorological records. They are the only neutral and disinterested evidence relating to what persons might have been doing on June 23rd. While these records were not put to Rodriguez, Treacy or Bloomfield in their examinations, each of them was properly challenged in cross-examination about their recollection of the weather conditions on June 23rd. The admission of the records and employer counsel's reliance on them in his submissions was unchallenged. Bloomfield's *viva voce* evidence respecting June 23rd and his Superintendent Daily Report are consistent with those records.

30. Therefore, in all of these circumstances, the Board prefers Bloomfield's evidence about what work was being performed that day at the St. James Town site. That preference, however, does not extend to the question of who was performing that work. The Board is satisfied on the basis of the *viva voce* evidence of Bloomfield and Grotsch, which is generally supported by the documentary evidence, that Grotsch spent the majority of his time on June 23rd at the St. James Town site working on the removal of the waterproof membrane from the concrete roof slab and that Grotsch was operating the Bobcat for all but 20 minutes of that activity. With respect to Lefevre, however, the *viva voce* evidence of Bloomfield and Grotsch that he was on the St. James Town site, and Stanford's evidence that Lefevre was not on the Health and Welfare site, conflicts with Small's evidence that Lefevre was on the Health and Welfare site at the start and end of the day and several times in between. The resolution of that conflict is not helped by the discrepancy between the daily time sheet for the St. James Town site and the number of labourers recorded on the Superintendent Daily Report for that site on June 23rd, or by the casual approach to the recording of Lefevre's time as demonstrated by Stanford's explanation of how the time sheets for the St. James Town and the Health and Welfare sites showed him spending a full day at each site on June 20th. In these circumstances, the Board prefers Small's evidence. It was simple, direct and unshaken in cross-examination. On that evidence, therefore, the Board finds that Lefevre spent the majority of his time at the Health and Welfare site on June 23rd. Except for Small's evidence that Lefevre helped him and Jeronimo briefly in the morning, there is no evidence that Lefevre performed any construction labourer work at the Health and Welfare site that day. Therefore, the Board finds that Lefevre was not employed as a construction labourer for the majority of his time on June 23rd.

31. It follows, then, that Lefevre was not employed in the bargaining unit for the majority of his time on June 23rd. Applicant counsel contends that Grotsch also was not employed in the bargaining unit for the majority of his time on June 23rd because, when he was operating the Bobcat, he was not performing the work of the construction labourer trade. In the Board's experience, the operation of skid-steer loaders is an area of unsettled work jurisdiction between the construction labourer and operating engineer trades. In these circumstances, the Board is not prepared to find that Grotsch, who was hired as a labourer and on the evidence, worked as a labourer until June 23rd, was not employed in the bargaining unit of construction labourers on June 23rd because he spent the majority of his time that day operating a skid-steer loader. Counsel also contends that placing hoarding, work which Grotsch testified he was doing all morning on June 23rd, was work of the carpenter trade and not the construction labourer trade. The Board disagrees. Even if another trade, or other trades, place the type of hoarding used on the St. James Town site, in the Board's experience it is work commonly done by the construction labourer trade. So, even if Grotsch spent the majority of his time on June 23rd placing hoarding, he would have been employed for the majority of his time on that day in the bargaining unit which the Board has found to be appropriate for purposes of collective bargaining.

32. The Board finds, therefore, that Lefevre was not employed as a construction labourer

for the majority of his time on the date of making this application and is to be excluded from the bargaining unit and Grotsch was employed as a construction labourer for the majority of his time on that date and is to be included in the unit for purposes of ascertaining the number of employees in the bargaining unit at the time the application was made. In the result, the Board finds that Frank J. Grotsch, John Jeronimo, Steven C. Long, Sam Rodriguez and Stephen Small were the employees in the bargaining unit at the time the application was made.

33. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 6, 1989, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

34. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

... the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

35. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

CONCURRING OPINION OF BOARD MEMBER C. A. BALLENTINE; February 28, 1991

1. I concur with the conclusion that Joseph Lefevre should not be included in the unit of employees for purposes of ascertaining the number of employees in the unit at the time the application was made. However, I would have excluded him for the additional reason that, on the evidence, I would have found that he exercises managerial functions within the meaning of subsection 1(3)(b) of the *Labour Relations Act*.

2011-90-R Service Employees International Union, Local 204 Staff Association, Applicant v. **Service Employees International Union** and Service Employees International Union, Local 204, Respondent v. United Steelworkers of America, Intervener

Certification - Trade Union Status - Employees signing “membership cards”, then meeting to adopt constitution - After approving constitution, no individuals admitted or confirmed into membership - No vote of “members” to ratify constitution - No officers elected - No explanation offered for failure to complete process - Board not satisfied that applicant a trade union within meaning of the Act - Certification application dismissed

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *J. A. Rundle* and *E. G. Theobald*.

APPEARANCES: *C. Ireton*, *J. Aggimenti*, *M. Ortlieb* for the applicant; *R. Davidson* for the respondent; *M. Gottheil*, *C. Vermey* for the intervener.

DECISION OF THE BOARD; February 18, 1991

1. This is an application for certification in which a pre-hearing representation vote was requested and, pursuant to a decision of the Board (differently constituted), held on December 19, 1990. Since the applicant has not previously established that it is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*, the ballot box was sealed pending determination of that issue.

2. At the hearing in this matter, subject to an argument raised by the intervener regarding the validity of certain membership evidence, the only issue in dispute between the parties involved the question of the applicant's status.

3. The evidence was neither complex nor contentious. For some time some bargaining unit employees, who are primarily business agents employed by the respondent union, had discussions regarding the appropriateness of being represented for collective bargaining purposes by the intervener.

4. An organizational meeting was held on June 16, 1990 for the purposes of discussing the formation of a new trade union to displace the existing bargaining agent. The minutes of that meeting record the following comments:

- Joe said the card must go to the Labour Board for approval. As soon as it is ready he will take it. Also that we have to have a constitution.
- Mark: At our next meeting we can put the constitution together. *This has to be done before we sign any cards.*

[emphasis added]

- The dues structure and elections can be done after the card and constitution are approved. Joe will see the cards and constitution go to the Labour Board for approval.

5. The next meeting took place on August 11, 1990 and commenced at approximately 8:30 a.m. In the hour or so prior to the commencement of the meeting, the six individuals about to attend signed “membership cards” in the name of the applicant. At the meeting itself the articles

of a proposed constitution were moved one by one and unanimously carried. Subsequent to the approval of the constitution, no individuals were admitted or confirmed into membership. No vote of "members" was held to ratify the constitution. No officers were elected as contemplated in the constitution (although three individuals were authorized to open a bank account and make disbursements).

6. The next meeting took place on November 9, 1990, one week after the present application had been filed. At that meeting officers were elected.

7. The intervener argued that the application ought to be dismissed on one or more of the following grounds:

- (i) The applicant failed to confirm or reaffirm the "membership" of individuals who signed cards prior to the adoption of the constitution. Further, no vote was held, let alone a vote of "members", to ratify the constitution;
- (ii) The applicant had no officers as of the application date; and
- (iii) Cards signed prior to the adoption of the constitution were nothing more than evidence of membership in a non-existent organization. Absent any act of reaffirmation, these cards should not be accepted as valid membership evidence.

8. Apart from asserting that the results of the vote should determine the matter, the only legal argument offered by the applicant was that it had followed the steps set out in the "Guide".

9. "A Guide To The Labour Relations Act" is a booklet prepared and made available to the public by the Board. In the section titled "The Legal Requirements for Establishing a Trade Union" and in response to the question "what must a group of employees do to form an organization that will be recognized as a trade union?" the Guide offers, *inter alia*, the following:

.... The current procedure is as follows: the employees proposing to form a trade union hold a meeting; a written constitution is prepared; the employee group votes to approve the constitution; then the employees involved become members; and, finally the members vote to ratify the constitution. Then they elect officers of the union to administer its business and represent it.

10. Of course the five steps referred to in the Guide emerge from the Board's jurisprudence and have been referred to in numerous Board decisions including *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472 where they were outlined as follows at paragraph 10:

The following steps should be taken by an organization wishing to establish its status as a trade union within the meaning of the Act.

- (1) A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings;
- (2) the constitution should be placed before a meeting of employees for approval;
- (3) the employees attending such meeting should be admitted to membership;
- (4) the constitution should be adopted or ratified by the vote of said members;
- (5) officers should be elected pursuant to the constitution.

11. Notwithstanding the assertions of the applicant, in evidence and in argument, that the five steps set out in the Guide were followed; this is patently not the case. There was no dispute that the first two steps were followed; there was simply no evidence that the last three steps were accomplished at the August 11th meeting or prior to the filing of the present application. And while the last step (election of officers) was accomplished subsequent to the application date, we note that an applicant must generally establish its status as of the date of the application (see for example *City of Mississauga Public Library*, [1975] OLRB Rep. Oct. 788 and the cases cited therein at paragraph 19). In this regard we note that it is the applicant who has the control to determine the application date. Any applicant choosing to file an application prior to the ultimate conclusion of the steps necessary to form a trade union does so at its peril. Having completed only two of the “five steps” as of the application date, it follows, therefore, that if the matter is to be determined solely on the basis of the “five steps” (the only basis put forward by the applicant), trade union status has not been proved.

12. It must be acknowledged, however, that the “five steps” have never been seen by this Board as the exclusive proof of trade union status. In this regard we note the observations of the Board in *Center Tool & Mold Company Limited*, [1985] OLRB Rep. May 633 at paragraph 16:

... In determining whether an entity or group of persons constituted a trade union, the Board is obliged not to impose requirements unsupported by the language of section 1(1)(p) in the context of the *Labour Relations Act: re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] 2 O.R. 498 (Ont. C.A.); and see, *Board of Education for the City of York*, [1984] OLRB Rep. Sept. 1279 at paragraphs 38 to 61. The definition requires that there be an organization. The precise nature of that organization is not defined, but certain necessary characteristics can be inferred from the modifying phrase of employees and from the nature of the rights, obligations and duties conferred and imposed on the trade unions by the *Labour Relations Act*.

13. Thus while the “five steps” are not found articulated expressly in the legislation, they do represent the Board’s efforts, over time, to codify and articulate the essential characteristics of a trade union in view of the definition and statutory context. Of course the five steps perform another and perhaps more significant function - they provide a detailed road map which employees may reliably follow in an effort to found a trade union.

14. As already indicated, however, accomplishment of the five steps in the appropriate order has never been the exclusive manner of establishing trade union status. A number of cases have suggested or found that an organization may be found to be a trade union even in the absence of strict compliance with the five steps (see for example *Hotel Dieu Hospital, St. Catharines*, [1969] OLRB rep. June 367; *Proctor-Lewyt Division of SCM (Canada) Limited*, [1969] OLRB Rep. Sept. 760; and *Local 199 U.A.W. Building Corporation, supra*). Without reviewing the details of these cases suffice it to say that substantial compliance with the five steps may result in a finding of trade union status.

15. If we examine, briefly, the Board’s treatment of one of the five steps - the requirement for officers, a similar approach emerges.

16. The importance of officers to a trade union was described in *J. Harris & Sons Ltd.* 60 CLLC 16,177 as follows:

How may a trade union under the legislation, perform its functions, achieve its purposes, or exercise its rights, or discharge its obligations unless it has duly authorized persons by and through whom it may act and be bound? Without officers or other duly authorized persons, the applicant, by its constitution, may only act and be bound through a general convention of members. In this respect its position is somewhat analogous to a corporation which may only act and

be bound by and through its officers or agents or its shareholders at a general or special meeting. Without authorized persons to act on its behalf, every act of the applicant would require the sanction of a general convention of members with all the procedural requirements entailed thereby. It is obvious that this would impose such a restriction on its activities that for all practical purposes it would be impossible for it to carry out the purposes of its constitution. It is precisely for this reason that the applicant's constitution provides for the election of officers of an Executive Committee to govern and administer its affairs. This constitution prescribes, by means of the Executive Committee, the medium and machinery through which it will administer the articles of its constitution and effectuate its purposes and objectives. It also amounts to a form of agreement between the organization and its membership which governs the rights and duties of its members and its officers in their relation to the organization and between themselves.

Further, it seems implicit in section 55 [now section 84] of the Act and the sections thereof which deal with collective bargaining and the rights, responsibilities and duties of trade unions, that a trade union will have responsible persons to act and make decisions on its behalf. In this regard section 55 provides, *inter alia*, that the Board

... may direct any trade union ...to file with the Board...a copy of its constitution and by-laws and a statutory declaration of its president or secretary setting forth the names and addresses of its officers.

In regard to notices, proceedings before the Board, collective bargaining, conciliation and arbitration, the Act clearly presupposes the existence of responsible representatives to act on behalf of the union....

17. These words were adopted and amplified in a more recent Board decision in *Butterfield Division, Litton Canada Inc.*, [1985] OLRB Rep. July 1001 at paragraph 10:

In addition to section 84, a number of other provisions in the Act clearly contemplate that a "trade union" will have officers. For example, section 85(1) requires every trade union, upon the request of any member, to furnish the member with a "copy of the undated financial statement of its affairs to the end of its last fiscal year certified by its treasurer or other officer responsible for the handling and administration of its funds to be a true copy". See also sections 46(3), 66(c), 74, 82(1), 91(1), 92, 98, 99(2), and 101(2). Moreover, it is difficult to envision how the important powers and obligations of a "trade union" which obtains certification under the Act (or otherwise gains bargaining rights for employees) could be exercised or fulfilled without officers elected under its constitution or otherwise duly authorized to act as officers thereof. Thus, the requirement that an applicant have such officers before the Board will find it to be "an organization of employees formed for purposes that include the regulation of relations between employees and employers" is not a mere technicality, but rather is the construction of section 1(1)(p) which, in our view, best ensures the attainment of the objects of the Act according to its true intent, meaning, and spirit (see the *Interpretation Act*, R.S.O. 1980, c. 19, s. 10).

18. Yet despite the observations in those cases, there have been cases where incomplete election of officers (*The Public Utilities Commission of the Borough of Scarborough*, [1982] OLRB Rep. Apr. 609) or, indeed, the existence of only a temporary executive committee not contemplated by the constitution (*The Gold Crest Products Limited*, [1973] OLRB Rep. Aug. 436) have not precluded a finding of trade union status. On the other hand, the complete absence of any officers or other individuals authorized to act on behalf of the newly formed organization has generally been fatal (see the *Butterfield case*, *supra* and the many cases cited therein).

19. The applicant in the present case has only managed to accomplish two of the five steps referred to. No explanation was offered for its inability to complete the process. Nor, in the circumstances of this case, are we prepared to find that there has been substantial compliance with the five steps or otherwise find the applicant has proved that it is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. It follows that since the applicant has failed to satisfy us that it has status to bring the application, the application must be dismissed.

20. In view of this finding it is unnecessary for us to consider the intervener's argument that "membership cards" signed prior to the adoption of the constitution are not valid membership evidence. We would merely observe that there is substantial authority for this argument and note that on the facts of this case, discounting such evidence would reduce the applicant's level of membership support below the 35% it required to be entitled to the vote already held in this matter and would, consequently, result in this application being dismissed.

2561-90-R; 2562-90-R Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Applicant v. Sheraton Parkway Hotel, Respondent v. Group of Employees, Objectors

Certification - Membership Evidence - In accordance with Board's new procedure, union attending meeting convened by Labour Relations Officer before the hearing date and then seeking to withdraw certification application - Whether union should be permitted to withdraw certification after meeting with LRO - Board noting that Practice Note No. 7 was drafted prior to recent changes in Board's procedure and not contemplating facts of this case - Board applying spirit and intent of Note and dismissing application - Board declining to adjudicate non-pay allegation and rejecting employer submission that Board retain membership evidence for 6 months

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *J. A. Ronson* and *H. Peacock*.

APPEARANCES: *Craig Flood* for the applicant; *E. L. Stringer*, *R. Kaptyn* and *S. Kaptyn* for the respondent; *M. Hammond* for the objectors.

DECISION OF BRAM HERLICH, VICE-CHAIR, AND BOARD MEMBER H. PEACOCK:
February 26, 1991

1. The name of the respondent is amended to read: "Sheraton Parkway Hotel".
2. These are applications for certification involving separate full and part-time bargaining units of the respondent's employees.
3. The applications were filed on December 28, 1990 and a terminal date of January 16, 1990 was set in respect of both files which continued through the process together.
4. In accordance with Board's recently implemented procedure, the Registrar advised the parties, by letters dated January 7, 1991 as follows:

... Please be advised that a Board Officer from the Ontario Labour Relations Board will convene a *meeting of the parties* to this application for certification in its Board Room, 6th Floor, 400 University Avenue, Toronto, Ontario on Friday, January 25, 1991 at 9:30 am.

The purpose in attending the *Officer's meeting* will be to address all questions that may be raised in connection with the appropriateness for collective bargaining purposes of the units proposed in the application and any reply, the membership support for the union, and such other issues as may arise as a result of the application filed. This meeting may result in the Board issuing a decision in this matter without an oral

hearing, taking into consideration agreements reached between those attending the meeting ...

[emphasis added]

5. Attached to these letters were, *inter alia*, documents (Form 2 in the case of the applicant, Form 4 in the case of the respondent) advising that:

“... the *hearing of the application by the Board* will take place at the Board Room at 400 University Avenue, Toronto, Ontario, on the 1st day of February, 1991, at 9:30 o’clock in the forenoon ...”

[emphasis added]

(The above information regarding the scheduled Officer’s meeting and Board hearing was conveyed to employees via Form 6 which was posted in the workplace on January 9, 1990.)

6. By letter dated January 23, 1991 the applicant advised that “... in the event the applicant is not entitled to automatic certification in this matter, the applicant hereby applies for certification pursuant to section 8 of the Ontario *Labour Relations Act* ...”

7. Particulars in support of that claim were filed and in addition a section 89 complaint was filed in relation to the same allegations particularized in support of the application under Section 8.

8. The parties, including a representative of a group of objecting employees, met with a Board Officer on January 25, 1991 as scheduled and entered into the following written agreement:

(a) The parties agree to adjourn the *hearing* of these matters to a date(s) to be fixed by the Board based upon dates agreed to by the parties’ solicitors.

(b) The parties agree to use February 1st as a *meeting day* with the Officer.

[emphasis added]

9. Having regard to their agreement, the Registrar advised the parties by letter dated January 30, 1991 and transmitted by fax as follows:

Having regard to the agreement of the parties, *hearing* in these matters scheduled for February 1, 1991 hereby adjourned to a date to be fixed by the Board. Please be advised that a Labour Relations Officer shall convene a *meeting of the parties* on February 1, 1991 commencing at 9:30 a.m. ...

[emphasis added]

10. The parties met with the Officer on February 1, 1991 as scheduled and prior to various challenges to the list of employees being resolved and prior to the Officer announcing the count, the applicant sought, in writing, leave of the Board to withdraw the present applications including the applications under section 8. The parties then appeared before this panel of the Board on February 1, 1991 to deal with the applicant’s request.

11. Subsequent to the hearing in this matter the applicant, on February 5, 1990 filed fresh certification applications (Board Files 2871-90-R and 2872-90-R hereinafter referred to as “the subsequent applications”) in respect of the same employees affected by the present applications. By letter dated February 13, 1991 referring to both the present and the subsequent applications, the respondent has requested that the Board, pursuant to section 103(3)(a) treat the subsequent applications as having been made on the date of the making of the present applications and that all four

of the applications in question be consolidated. The applicant, by letter dated February 18, 1991 opposes this request.

12. We shall deal first, to the extent we need to, with the respondent's request under section 103(3). We note, first of all, that section 103(3) of the *Labour Relations Act* is designed to assist the Board with the procedural difficulties which may arise when multiple certification applications involving the same (or at least overlapping groups of) employees are currently before the Board. The section, not surprisingly, is most often applied when the applications are filed on behalf of different applicants. In this context the Board has developed certain rules of thumb in respect of the application of the section. Specifically, where a subsequent application has been filed on or before the terminal date of the first application the Board normally applies the provisions of section 103(3)(a); section 103(3)(b) is normally applied where a subsequent application has been filed after the terminal date of the first application (see for example *M. Pickard Construction Co. Ltd.*, [1989] OLRB Rep. Oct. 1046). Thus, even if section 103(3) should or would be applied to the subsequent applications it would appear that the Board would postpone consideration of those applications until a final decision has been issued on the present applications. However, we neither need nor propose to make any final determination with respect to the application of section 103(3) to the subsequent applications. The present applications, however, are a different matter. A hearing has been held, the parties have had the opportunity to call all relevant evidence and make their full submissions to the Board. We see nothing in the respondent's request to apply section 103(3) to the subsequent applications which either does or should preclude us from issuing a final decision on the present applications. Any issues regarding section 103(3) and the subsequent applications can be raised with the panel hearing those matters.

13. Prior to appearing before the panel on February 1, 1991, the respondent had filed with the Board allegations that seven named individuals had signed membership cards but did not pay the required \$1.00. In accordance with its usual practice the Board initially determined which of the named individuals were employees included on the list of employees filed by the employer and on whose behalf the applicant had filed membership cards. Prior to the applicant announcing its intention to seek leave to withdraw its application, the Board had commenced and completed its initial investigation with respect to two of those individuals. One of the individuals confirmed having both signed a card and paid a dollar. The second individual confirmed signing a card but denied having paid the dollar which the application for membership indicates was paid. Had these applications continued in the normal course the Board would have completed its investigation in respect of the other individuals. In any event, a hearing would have been held and witnesses would have been summonsed by the Board to testify and be cross-examined by the parties with respect to (at least) the one individual who apparently now denies having paid a dollar.

14. The applicant argued that, in the circumstances, it ought to be permitted to withdraw its applications.

15. The respondent (all of whose arguments were adopted by the objectors) argued that the applications ought to be dismissed. Quite apart from whether withdrawal or dismissal was the ultimate fate of the applications, the respondent made further submissions. In view of the non-pay allegations and the "real possibility" of a "fraud upon the Board" the respondent argued that the union ought not to be permitted to escape the consequences which would flow from such a determination. The Board should therefore, notwithstanding the applicant's request to withdraw, proceed to adjudicate and determine the non-pay issues. Alternatively if the Board declines to pursue the non-pay allegations, it should endorse the record so as to reserve the employer's right to raise these allegations anew in any subsequent application. Further, in the circumstances, the Board

ought to confiscate, or at least retain for six months, all membership evidence filed in support of the present applications so as to prevent any improper tampering with the cards by the applicant.

16. A related argument was raised in relation to the applicant's request to withdraw its applications under section 8. The respondent argued that the Board ought to adjudicate the section 8 allegations or, alternatively, that the effect of the applicant's request ought to be to dispose of the section 8 allegations and to consequently preclude the applicant from relying on those allegations in any subsequent certification application.

17. Dealing first with the respondent's argument that the Board ought to adjudicate the non-pay and section 8 allegations, we find these submissions to be entirely without merit. These allegations arise in the context of certification applications and are only relevant in that context. Once the applicant indicates that it does not wish to pursue the applications there is simply no reason to force the litigation which might otherwise have occurred. To have the Board adjudicate matters of no immediate relevance to the application or complaint currently before it would be nothing more than a wasteful allocation of the Board's limited resources. We also note that in the case of the section 8 allegations, if the respondent's primary objective is to see these matters litigated, it would appear that objective will likely be realized since the applicant has indicated no intention to withdraw its section 89 complaint which is founded upon substantially identical allegations. Similarly, in the case of the non-pay allegations, the respondent conceded that even a successful prosecution of those allegations would result in nothing more than a dismissal of the present applications, a result which the respondent may otherwise be entitled to in the present case.

18. Having determined that it would be inappropriate to litigate the non-pay or section 8 allegations in the context of the present applications, neither do we feel it appropriate to, at this point, spell out the consequences, if any, of the applicant's request for any future application. Nor would our view change in this matter if there were no outstanding section 89 complaint.

19. In the case of the non-pay allegations, the respondent's submissions are premised on the validity of the allegations. The allegations, of course, can only be found to be well founded after a hearing before the Board, which we have already determined would be of no value in the context of the present applications. There is no reason at the present time for the Board to make any assumptions regarding the validity of the allegations. More importantly, however, there is no reason for the Board to make any assumption regarding the relevance of the allegations in any subsequent certification application. In short, the relevance of the non-pay allegations or the validity of any membership evidence currently before the Board in any subsequent application is a matter upon which it would be unwise to speculate.

20. In these circumstances we are not persuaded that we ought to accede to any of the respondent's alternative requests. The respondent summarized its aim as seeking to ensure that it was not precluded from challenging the validity of membership evidence submitted to date in any subsequent application. While we are not granting the respondent's requests neither do we see this decision as precluding it from challenging membership evidence in the subsequent applications. The relevance, propriety and the merits of any such challenge are matters for the panel dealing with the subsequent applications to determine.

21. Finally, we must deal with the ultimate disposition of the present application: ought the applicant to be permitted to withdraw?

22. We were referred to Practice Note No. 7, the relevant portions of which provide as follows:

1. Where, on an application for certification or for a declaration terminating bargaining rights, the applicant has notified the Board, before the hearing on the application and *at a time when the Registrar has been able to notify the parties that the hearing has been cancelled*, that it was desirous of withdrawing the application, the Board has permitted the applicant to withdraw the application. (See *Kitchen Installations*, 63 CLLC ¶16,273.

2. Where a request for leave to withdraw is made,

- (i) at a hearing, or
- (ii) before the hearing at a time when the Registrar has not been able to notify the parties that the hearing has been cancelled and the respondent or any other interested person or trade union has attended at the hearing, or
- (iii) after a hearing has been held,

it has been the practice of the Board to endorse the record to show that, although the applicant has requested leave to withdraw its application, the application has been dismissed. See, however, paragraph 3 below.

• • •

4. Where, on a construction industry application, and prior to any hearing being directed by the Board, an applicant requests leave to withdraw its application *after* an examiner has been appointed and *has met* with the parties, the Board in its endorsements in a number of recent cases has noted the request to withdraw and has dismissed the application.

5. Where, on an application for a pre-hearing representation vote, *after* an examiner has been appointed and *has met* with the parties, an applicant requests leave to withdraw its application, the Board in its endorsement has noted the request to withdraw and has dismissed the application. See *Lake Simcoe Ice & Enterprises Limited*, [1963] OLRB Rep. June 159.

• • •

23. The union argues that paragraph #1 is the operative provision in this case. Although a hearing was initially scheduled for February 1, 1991, that hearing was adjourned on the consent of the parties. Although the parties met on two different occasions with a Labour Relations Officer, the applicant's request to withdraw was clearly made "before the hearing on the application". The requirement that the Registrar be able to "notify the parties that the hearing has been cancelled" is not relevant since at the time of the request no hearing had yet been scheduled.

24. The respondent's submissions would have us focus on the stage in the "proceedings" at which the request was made. Counsel argues that the Board will normally permit withdrawal of an application where the request is made prior to the commencement of the proceedings. In view of the role of the Board Officers in certification applications, we should treat the "proceedings" as having commenced once the officer convened the first meeting of the parties on January 25, 1991. No withdrawal should be permitted after that time.

25. We agree with the applicant's submission that a meeting with an officer, whether or not part of the "proceedings", does not constitute a "hearing" in the way that term would normally be understood. In that respect there is some force to the applicant's submission. We are also of the view, however, that we cannot properly determine the issue without considering other portions of the Practice Note and, perhaps more importantly, without considering the development of the role of the Labour Relations Officer in certification proceedings.

26. The importance of Labour Relations Officers in certification applications simply cannot be overemphasized. While at one time virtually every certification application may have resulted in

a hearing before a panel of the Board, recent and current Board practice results in the vast majority of certification applications being resolved between the parties through the participation of a Labour Relations Officer. Until very recently certification applications were routinely scheduled on Fridays but rather than proceeding immediately to a hearing before a panel of the Board, the parties were directed to a Labour Relations Officer whose participation, far more often than not, resulted in the disposition of the application without the necessity of a hearing before a panel of the Board.

27. While that system was efficient in terms of disposing of applications, it had one significant undesirable effect. Numerous panels of the Board would be on "standby" to commence hearings. However, because of the high success rate of the Labour Relations Officers many of those panels were never required to sit (or, alternatively, even in cases where it was ultimately determined a hearing before a panel would be required, that determination was made so late in the day that it would make little practical sense to commence the hearing at that time). The result, of course, was that a significant amount of available panel time was left unused despite the large volume of cases (certification or otherwise) always currently before the Board.

28. In order to remedy that problem and to provide a more efficient use of Board resources, the Board's standard scheduling of certification procedures has recently been changed. As in the present case, parties are no longer sent a notice of hearing with the implicit understanding that a meeting with a Labour Relations Officer will replace, or at least precede, the hearing. Rather, parties are advised that a meeting with a Labour Relations Officer will be held on the first Friday (Thursday, outside of Toronto) and a hearing will be held (if necessary) on the following Friday (or Thursday). In this fashion the Board is able to predict with a much higher degree of certainty how many applications actually need to be listed for hearing the following week. So far this new system appears to be serving the needs of both the community and the Board well.

29. Returning more specifically to the issue at hand we note that under the former procedure (meeting and hearing scheduled on the same day) an applicant seeking leave to withdraw at the meeting with the Labour Relations Officer and before the hearing would see its application routinely dismissed.

30. We attach no significance to the fact that there were two separate meetings with the Labour Relations Officer in the present case. However, we do not see why the applicant in the present case should be in any better position than the applicant described in the preceeding paragraph.

31. Thus, while an extremely literal reading of paragraph one of the Practice Note might support the applicant's position, it is clear that the paragraph was drafted prior to the recent change in the Board's procedures. Thus, it could not have contemplated and, when read in conjunction with other paragraphs of the Note, does not contemplate or catch the facts with which we are currently dealing.

32. We have already indicated that we do not view the officers meeting as a "hearing" - the Officer essentially records the parties' agreement and dispute, she performs no adjudicative function, delegated or otherwise. Consequently, neither can we conclude that paragraph 2 of the Note, which is linked to the "hearing", applies and necessitates a dismissal in the present case.

33. The paragraphs of the Note which we find more helpful are paragraphs 4 and particularly 5. These paragraphs contemplate that once a Labour Relations Officer has met with parties in the context of the application contemplated therein, an applicant's request to withdraw will result in a dismissal.

34. We see no reason why, in the context of the issue currently before us, an applicant seeking certification via the pre-hearing representation vote procedure should be treated less favourably than an applicant who follows the "regular" certification procedure. The reality is that (apart from differences not material to the issue currently before us including, of course, the critical distinguishing factor i.e. the holding of a vote prior to the hearing) there is now a distinct similarity in the procedures followed in both types of applications. The inconvenience to (all) parties of having to attend a Labour Relations Officer meeting is no greater in the case of a pre-hearing application.

35. Consequently in view of our conclusion that Practice Note No. 7 does not specifically address the situation currently before us but considering the spirit and intent of the Note as whole, we are of the view that the current applications ought to be and are hereby dismissed.

DECISION OF BOARD MEMBER J. A. RONSON: February 26, 1991

1. This is a certification application in which the parties met with a Board Officer on January 25, 1991. The matter was scheduled for hearing before the Board on February 1, 1991.

2. Prior to the meeting on January 25th, the union filed a Section 89 complaint against the employer and requested that it be certified pursuant to Section 8 of the Act.

3. At the meeting with the Board Officer On January 25th the parties adjourned the certification hearing to a date to be agreed upon by the parties. The parties also agreed to meet with the Board Officer again on February 1st.

4. During the ensuing week the employer filed "non-pay" allegations against the union membership evidence. The Board instituted its usual investigation with respect to the allegations. Had the certification application proceeded, the Board Would have ordered a formal hearing into the allegations.

5. The parties met with the Board Officer on February 1st and the union then submitted a written request for leave to withdraw it certification application. Given its request for certification pursuant to Section 8, the subsequent request for withdrawal could only be described as a surprise.

6. I differ from my colleagues' disposition of this matter in but one respect. If there is a fraud on the Board with respect to the membership applications cards in the possession of the Board and taking into account that the Board would have scheduled a hearing into the "non-pay" allegations, then potential evidence of the alleged fraud should be retained by the Board. I would direct that the photocopies of the membership applications should be made and retained in this file before the original documents are returned to the union.

1547-90-U Christopher Topple, Complainant v. The International Union, United Plant Guard Workers of America Local 1962, Respondent v. General Motors of Canada, Intervener

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Employer and union moving to dismiss complaint without hearing - Board striking certain allegations but not dismissing complaint completely - Board also striking request that complainant be reinstated in employment with employer because Board has no jurisdiction to overturn arbitrator's decision with respect to complainant's grievance - Board not ruling, at preliminary stage, whether fair representation duty extending to making judicial review application

BEFORE: *G. T. Surdykowski*, Vice-Chair.

DECISION OF THE BOARD; February 19, 1991

1. By letter dated and faxed to the Board on February 13, 1991, the complainant writes as follows:

On the previous day of the hearing, specifically, on November 27, 1990, Vice-Chair Surdykowski rendered an oral decision pertaining to the structure in which the hearing was to proceed. I recall that he stated that that decision of the Board would be forthcoming in writing.

As I have not received this decision to this date, I would like to request of the Board to have it sent out. Thank you.

Yours very truly,

"Chris Topple"

2. I assume that the oral decision to which the complainant refers in his letter was the ruling given with respect to the motions by the respondent and the intervener that the complaint should be dismissed without a hearing. It is true that I indicated that I would put my ruling into writing. However, I saw no need to and did not contemplate doing so until the hearing was completed. On the other hand, this may be as opportune time as any to do so.

3. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that the respondent trade union has failed to represent him fairly, contrary to section 68 of the Act. At the hearing convened on November 27, 1990, the respondent and the intervener employer moved that the Board dismiss the complaint without a hearing on the basis that in pleading the particulars contained in his October 26, 1990 letter the complainant had improperly attempted to expand his complaint and that the particulars properly pleaded do not reveal a *prima facie* case for either the complaint or the relief requested.

4. Upon hearing the representations of the parties, I dismissed the motions to dismiss the complaint. However, I also ruled that certain portions of the complaint had not been properly particularized or were not relevant to it, and I therefore struck these from the complaint and ruled that the hearing of it would be restricted to those parts of the complaint which had been properly particularized. The following is an edited version of the oral reasons I gave in that respect at the time.

5. Previous decisions of the Board (differently constituted) in this matter, among other things, directed the complainant to provide particulars of his complaint while, at the same time,

dismissing a previous motion to dismiss it for failing to reveal a *prima facie* case. Read together, these determinations are not, in the circumstances, inconsistent.

6. I was satisfied that the particulars provided by the complainant in his October 26, 1990 letter did expand the complaint beyond what was originally pleaded. However, I perceived no prejudice which might result if the expanded complaint was allowed to proceed. In the circumstances, and having regard to the need to have labour relations disputes resolved as quickly and comprehensively as possible, I was satisfied that it was appropriate for me to consider the expanded complaint.

7. However, the sufficiency of the complainant's particulars was another matter. Section 72 of the Board's Rules of Procedure and section 8 of the *Statutory Powers Procedure Act* require a party alleging improper conduct to provide particulars of its allegations to the party alleged to have acted improperly. As the Board noted in *Pebra Peterborough Inc.*, [1987] OLRB Rep. March 421:

• • •

3. ...This requirement is based on both legal and labour relations considerations. The legal consideration is a recognition of the rule of natural justice that a party against whom the allegations of wrongdoing are made must have sufficient notice of them to enable it to know and prepare for the case that it must meet. The labour relations consideration is that there be no prejudicial delay in the proceedings (see *Trigiani Contracting Ltd.*, [1979] OLRB Rep. Feb. 141). Where an allegation made in any document filed with the Board is not sufficiently particularized, the Board may, when requested, either strike out that allegation or direct that further particulars be provided. Further, evidence of facts or circumstances that have not been included or sufficiently particularized in a document filed with the Board may not be adduced at the hearing of the matter to which they relate except with consent of the Board and then only upon such terms as the Board considers appropriate.

4. On the other hand, the Board's approach to "pleading" is more lenient than that of the courts. Consequently, the Board will not usually strike out an allegation unless it is so lacking in particulars or so untimely that the party whose conduct is being complained of is so prejudiced that the allegation cannot properly be entertained in light of the legal and labour relations foundation for the requirement of particulars. In the Board's view it was not appropriate to strike out any of the allegations in the intervention or subsequent correspondence. However, we did agree that further particulars were required.

5. In considering the sufficiency of allegations, the Board considers whether or not they substantially identify the offences alleged and the acts or omissions complained of; whether the information requested is really required by the party requesting it; the knowledge or availability of knowledge possessed by the parties of the alleged improprieties; whether what is being requested is really evidence rather than particulars (though particulars may reveal evidence or names of witnesses); the apparent purpose for the demand for particulars; and, the general nature and circumstances of the improprieties alleged. ...

(See also *Wilf McIntyre* (sometimes referred to as *Gravel & Lake Services Limited*), [1990] OLRB Rep. Oct. 1052 at paragraphs 11 and 12).

8. It is no answer to a request for particulars or a direction that particulars be provided to say that the other party (or parties) is (or are) aware of the material facts. They must be pleaded for the reasons given in *Pebra Peterborough Inc.*, *supra*. In addition, while there is a distinction between facts and evidence, and evidence need not be pleaded, a material fact must be pleaded even if it is also evidence.

9. In this case, the complainant's particulars contain many of his conclusions rather than

facts and are sometimes otherwise vague. For example, it is not sufficient to plead that “multiple incidents” indicate that the respondent had acted improperly without identifying what these incidents were, when and where they took place and who was involved. Similarly, the complainant’s references to “repeated conflict” between the respondent and himself, the “collusion” alleged between the “international union” and the intervener and the “history” of the complainant’s relationship with the respondent have not been properly particularized. Further, I was not satisfied that the reference by the complainant who alleged “coercive effort” of an unidentified Board “official” have either been properly particularized or are relevant to this complaint. I saw no connection between that allegation and the respondent. I therefore ordered that all of these allegations be struck from the complaint.

10. I was not, however, prepared to dismiss the complaint entirely. In its expanded form, I understand the essence of the complaint to be that the respondent acted improperly in representing him with respect to the termination of his employment by the intervener in that it selected an arbitrator, supplied counsel for the arbitration, instructed counsel, and decided to not seek judicial review of the arbitrator’s decision on the basis of improper considerations. I was satisfied that the complaint could proceed, as pleaded, in that respect.

11. As I emphasized in my oral ruling, what is under scrutiny here is the representation of the complainant by the respondent with respect to his discharge by the intervener. The only breach of the Act alleged is of section 68. An employer has no obligations under section 68. Accordingly, an employer, in this case the intervener, cannot be found to be in breach of it. It is the trade union (in this case the respondent) which is the exclusive bargaining agent and representative of the bargaining unit employees which is obliged to represent the employees in the bargaining unit fairly; that is, in a manner which is not arbitrary, discriminatory or in bad faith. An employer can be a proper party for the purpose of a complaint which alleges a breach of section 68 if the remedy requested includes relief which might affect it.

12. The Board has no jurisdiction to overturn, vary or otherwise sit in review of the arbitrator’s decision with respect to the complainant’s grievance (see *Re Windsor Western Hospital Centre Inc. and Mordowanec et al.*, [1986] 56 O.R. (2d) 297 (Div. Ct.)). Further, the Board has held that honest mistakes or errors in judgement will not generally constitute a breach of the duty of fair representation imposed by section 68 (see, for example, *Chrysler Canada Limited*, [1982] OLRB Rep. Oct. 1417, *Canadian Union of Public Employees, Local 1000 - Ontario Hydro Employees Union* (sometimes cited as *Walter Princesdomu*) [1975] OLRB Rep. May 444). However, a trade union is properly held responsible for its improper conduct. It may be that a trade union will not necessarily be held responsible for every improper act of its agents, but it is difficult to understand why that should be so as a matter of general principle, since a trade union can only act through such agents.

13. In complaints alleging a breach of section 68, the Board is concerned with the nature and quality of the trade unions representation of the complainant. That concern extends to and includes a trade union’s conduct in all representation matters, including, arguably, its conduct and decisions prior to, in, and subsequent to an arbitration proceeding. In *Elizabeth Balanyk*, [1987] OLRB Rep. Sept. 1121 the Board held that it should only dismiss a complaint for failing to disclose a *prima facie* case or there is no reasonable (in the sense of “real”) prospect that the complaint can succeed (see also *J. Pavia Foods Limited*, [1985] OLRB Rep. May 690); that is, in the clearest of cases. I agree. I was not satisfied that this is one of those cases.

14. The complainant seeks reinstatement to his employment with the intervener together with full compensation for lost wages and benefits or, in the alternative, damages. For the reasons

given above, I was satisfied that I cannot, in these circumstances, order that the complainant be reinstated in his employment with the intervener and the complainant's request in that respect was also struck.

15. Because of the arguments advanced on the motions, I found it appropriate to specifically mention that nothing in my ruling should be taken to mean that the duty of fair representation either does or does not extend to the making of an application for judicial review, either generally or specifically in this case. It would not be appropriate to determine that question at a preliminary stage and, in any event, the complaint that is now claimed is not limited to that issue.

COURT PROCEEDINGS

1879-89-R (Court File No. 424/90) American Barrick Resources Corporation, carrying on business as **Holt-McDermott Mine**, Applicant v. United Steelworkers of America and Ontario Labour Relations Board, Respondents

Certification - Judicial Review - Natural Justice - Practice and Procedure - Board failing to respond to petitioner request for local hearing - Petitioners not attending scheduled hearing in Toronto - Board declining to schedule additional hearing to consider statement of desire - Interim certificate issuing - Employer bringing application for judicial review on grounds that there was denial of natural justice in Board not having considered evidence at hearing and that Board lost jurisdiction because evidence of Objectors went to issue of membership - Court holding that employer had no status to bring the application - Judicial review dismissed by Divisional Court

Board decision reported at [1990] OLRB Rep. March 267.

Ontario Court of Justice, Divisional Court, Steele, Weiler and Davidson JJ., February 1, 1991.

STEELE J. (Orally): American Barrick Resources Corporation, carrying on business as Holt-McDermott Mine (the "Employer"), applies for judicial review of the decision of the Ontario Labour Relations Board (the "Board"), certifying the Respondent Union as the bargaining agent for the employees at the Holt-McDermott Mine. The Board has raised a preliminary issue that the Employer has no status to bring this application.

The Board scheduled a hearing for November 24, 1989, to hear the application by the Union for certification. All of the appropriate notices were apparently given. A group of objectors led by Robert J. Bouchard filed a Statement of Desire in a timely fashion and also requested that the hearing be held in a more convenient location. This statement was received in the Board's offices prior to November 24, 1989, but through an administrative error, in part, caused by the objectors erroneously naming the Employer, was misfiled and not brought to the Board's attention until after the hearing. The objectors did not attend the hearing.

A few days after the hearing the statement was discovered and the Board notified the Employer, the Union and the objectors of its existence and the fact that it had not been submitted to the Board. The Employer asked for a new hearing. The Board then gave the Employer, the Union and

the objectors an opportunity to state their positions in writing (which they all did). The Board decided not to have a further hearing and issued a certification decision on March 1, 1991.

The grounds for this application brought by the Employer are that there was a denial of natural justice by the Board in its not having considered the evidence of the objectors at its hearing, and that the Board had lost jurisdiction because the evidence of the objectors when to the issue of membership which was at the very heart of the matter that the Board had to decide.

In our opinion, the Employer has no status to bring the application. The application to this court is not brought by the objectors. They are aware of the Employer's application because the Employer has filed an affidavit by Mr. Bouchard, which states that it is made in support of the Employer's application. This affidavit is his personal affidavit, sworn on April 25, 1990, which indicates that he is still collecting opposition signatures but he has not stated it to be on behalf of the original objectors. The objectors are not represented by counsel before the court, nor has any objector appeared in person.

We are of the view that the decision in *Re Canada Labour Relations Board and Transair Limited et al.* (1976), 67 D.L.R. (3d) 421, is determinative of the status issue. At p. 438 the court stated as follows:

If there is any policy in the *Canada Labour Code* and comparable provincial legislation which is pre-eminent it is that it is the wishes of the employees, without intercession of the employer (apart from fraud), that are alone to be considered vis-a-vis a bargaining agent that seeks to represent them. The employer cannot invoke what is a *jus tertii*, especially when those whose position is asserted by the employer are not before the Court.

The decisions in *Regina v. Ontario Labour Relations Board, Ex parte Nick Masney Hotels Ltd.*, [1970] 3 O.R. 461; *Re Baltimore Aircoil Interamerican Corp. and Ontario Labour Relations Board et al.* (1981), 130 D.L.R. (3d) 580; and *Re Domtar Packaging Ltd. and United Paperworkers International Union* (1973), 1 O.R. (2d) 45, are all distinguishable because in those cases the objectors appeared by counsel or person and supported the employers' position.

If there was a denial it was a denial of the objectors' rights not that of the Employer. The Court should be cautious in sanctioning an employer's application in the guise of being on behalf of objectors.

The application is dismissed with costs to the Respondent Union, fixed at \$2,500.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1991

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3337-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Povia Carpentry Trim o/b 563808 Ontario Inc. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit)

0280-90-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. M. & T. Walls & Ceilings Inc. (Respondent) v. Labourers' International Union of North America, Local 837 and Labourers' International Union of North America, Ontario Provincial District Council (Interveners)

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plasterers and plasterers' apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, and the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0934-90-R: United Steelworkers of America (Applicant) v. 503382 Ontario Ltd., c.o.b. as Blackburn Villa (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the City of Gloucester, save and except supervisors, persons above the rank of supervisor, registered nurses, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit) (*Having regard to the parties*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in the City of Gloucester, save and except supervisors, persons above the rank of supervisor, registered nurses and office and clerical staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

1564-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Harnden & King Construction A Division of George Wimpey of Canada Ltd. (Respondent)

Unit: "all employees of the respondent in all sectors of the construction industry in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and

Grenville, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (26 employees in unit)

1613-90-R: Ontario Public School Teachers’ Federation (Applicant) v. Peterborough County Board of Education (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: “all social workers and behaviour counsellors employed by the respondent in Peterborough County, save and except Chief Social Worker and Behaviour Services Manager, persons above those ranks, and employees in bargaining units for which any trade union held bargaining rights as of September 21, 1990” (6 employees in unit) (*Having regard to the agreement of the parties*)

1718-89-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Mike’s Painting & Decorating A Division of: Mike McMahon’s Painting & Decorating Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all painters and painters apprentices in the employ of the respondent in the ICI sector of the construction industry, save and except non-working foremen, and persons above the rank of non-working foreman” (15 employees in unit) (*Having regard to the agreement of the parties*)

1724-90-R: Ontario Secondary School Teachers’ Association (Applicant) v. The Sudbury Board of Education (Respondent)

Unit: “all employees of the respondent employed as student services personnel in the Regional Municipality of Sudbury, save and except supervisors, persons above the rank of supervisor, and employees in bargaining units for which any trade union held bargaining rights as of the date of application” (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1748-90-R: Hospitality, Commercial & Service Employees Union, Local 73 of the Hotel Employees & Restaurant Employees international Union (Applicant) v. Quetico Centre (Respondent)

Unit: “all employees of the respondent in the District of Rainy River, save and except supervisors, persons above the rank of supervisor and office staff” (16 employees in unit)

1826-90-R: Ontario Public Service Employees Union (Applicant) v. Madame Vanier Children’s Services (Respondent)

Unit #1: “all office and clerical employees of the respondent in London, save and except Human Resources Assistant, persons above the rank of Human Resources Assistant, secretary to the Executive Director, persons regularly employed for not more than 24 hours per week” (8 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

1922-90-R: Ontario Public Service Employees Union (Applicant) v. Community Living Huronia (Respondent)

Unit #1: “all employees of the respondent in the Village of Victoria Harbour and the Town of Penetanguishene, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (12 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the Village of Victoria Harbour and the Town of Penetanguishene regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (5 employees in unit) (*Having regard to the agreement of the parties*)

1944-90-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Milan Electric Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all journeymen and registered apprentice electricians in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and registered apprentice electricians in the employ of the respondent in all sectors of the construction industry in the the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

1997-90-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Lakehead Board of Education (Respondent)

Unit: “all special education support persons of the respondent in the District of Thunder Bay, save and except special education co-ordinator, persons above the rank of special education co-ordinator, office, clerical, custodial and maintenance staff, professional service personnel and employees in bargaining units for which any trade union held bargaining rights as of October 31, 1991” (46 employees in unit) (*Having regard to the agreement of the parties*)

2078-90-R: United Steelworkers of America (Applicant) v. V.I.P. Hotels Ltd. c.o.b. as Sutton Place Hotel (Respondent)

Unit: “all employees of the respondent at its Sutton Place Hotel in the City of Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, health club attendant, front desk receptionist, night auditor and persons for whom any trade union held bargaining rights as of November 7, 1990” (19 employees in unit) (*Having regard to the agreement of the parties*)

2100-90-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. The Hudson’s Bay Company (Respondent)

Unit: “all employees of the respondent in Kitchener, save and except department supervisors, persons above the rank of department supervisor, security staff, management trainees, office and clerical staff, persons employed in the hair salons, persons employed in Toronto distribution centre warehouse, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and students employed on a co-operative training program” (62 employees in unit) (*Having regard to the agreement of the parties*)

2170-90-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. Canadian Shipbuilding & Engineers Ltd. (Respondent)

Unit: “all journeymen and apprentice boilermakers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice boilermakers in the employ of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

2176-90-R: Service Employees Union, Local 183 (Applicant) v. Springdale Nursing Home, a subsidiary of OMNI Health Care Ltd. (Respondent)

Unit: “all employees of the respondent in the Township of North Monaghan, save and except supervisors and/or foremen, persons above the rank of supervisor and/or foreman, professional nursing staff, physiotherapists, occupational therapists, office and clerical staff, and students employed during the school vacation period” (52 employees in unit) (*Having regard to the agreement of the parties*)

2253-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. St. Lawrence Cement Inc. (Respondent)

Unit: "all employees of the respondent employed at its Dufferin Construction Company Division in the City of Mississauga, save and except superintendent, persons above the rank of superintendent, office, clerical and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of November 22, 1990" (6 employees in unit) (*Having regard to the agreement of the parties*)

2274-90-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Royal Doulton Canada Ltd. (Respondent)

Unit: "all employees of the respondent in its Distribution Division in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff, security staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (42 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

2277-90-R; 2278-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. McCrory-Printz Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector in the Province of Ontario, and all employees of the respondent in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2292-90-R: Ontario Public Service Employees Union (Applicant) v. Marriott Corporation of Canada Ltd. (Respondent)

Unit: "all employees of the respondent engaged in cleaning services at Mohawk College Campus in Hamilton-Wentworth, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (27 employees in unit) (*Having regard to the agreement of the parties*)

2299-90-R: International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, Local 58 (Applicant) v. The Corporation of the Town of Markham (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all stage employees of the respondent in the Town of Markham, save and except technical co-ordinator, persons above the rank of technical co-ordinator, and employees in bargaining units for which any trade union held bargaining rights as of November 30, 1990" (18 employees in unit) (*Having regard to the agreement of the parties*)

2319-90-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers Union of America (UAW) (Applicant) v. Versa Food Services A Division of VS Services Ltd. (Respondent)

Unit: "all employees of the respondent in North American Plastics Co. Ltd. in the Town of Wallaceburg, save and except supervisors, persons above the rank of supervisor, office staff and students employed during the school vacation period" (7 employees in unit) (*Having regard to the agreement of the parties*)

2329-90-R: Canadian Union of Public Employees (Applicant) v. Le Conseil des écoles françaises de la communauté urbaine de Toronto (Respondent)

Unit: "tous les employé(e)s de l'intimé dans la municipalité de Toronto métropolitain, employé(e)s pour l'en-

tretien (y inclus les concierges) à l'exception des superviseurs et des personnes dont le classement est supérieur à celui de superviseur" (13 employees in unit) (*Having regard to the agreement of the parties*)

2334-90-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Drs. Paul & John Re kai Centre (Respondent)

Unit #1: "all registered and graduate nurses employed by the respondent in a nursing capacity in the Municipality of Metropolitan Toronto, save and except the Director of Resident Care, persons above the rank of Director of Resident Care and persons regularly employed for not more than 24 hours per week" (9 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses regularly employed by the respondent in a nursing capacity in the Municipality of Metropolitan Toronto for not more than 24 hours per week, save and except the Director of Resident Care, and persons above the rank of Director of Resident Care" (7 employees in unit) (*Having regard to the agreement of the parties*)

2338-90-R: International Union, United Plant Guard Workers of America (Applicant) v. Ontario Hydro (Respondent)

Unit: "all security guards employed by the respondent at its Darlington Nuclear Generating Station in the Regional Municipality of Durham, save and except supervisors and persons above the rank of supervisor" (78 employees in unit) (*Having regard to the agreement of the parties*)

2355-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. H.A. Walker & Associates Ltd. (Respondent)

Unit: "all employees of the respondent employed at Canada Life Towers at 330 University Avenue and 190 Simcoe Street in the Municipality of Metropolitan Toronto, save and except foreman/forelady, persons above the rank of foreman/forelady, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (47 employees in unit) (*Having regard to the agreement of the parties*)

2362-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Triad Electric (Ontario) Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit)

2372-90-R: Ontario Public Service Employees Union (Applicant) v. Peterborough & District Association for Community Living (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Peterborough, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (81 employees in unit) (*Having regard to the agreement of the parties*)

2392-90-R: Sudbury Mine Mill & Smelter Workers Union, Local 598 of the Canadian Union of Mine Mill & Smelter Workers (Applicant) v. Northern Regional Residential Treatment Program for Women c.o.b. Lakeside Centre (Respondent)

Unit #1: "all employees of the respondent in Sudbury, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and

students employed during the school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Applications for Certification Dismissed Without Vote*)

2394-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. Philmor Group Ltd. (Respondent)

Unit: "all employees of the respondent at 6521-6509 Glen Erin Drive in the City of Mississauga, save and except Property Manager, persons above the rank of Property Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (*Having regard to the agreement of the parties*)

2400-90-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of King (Respondent)

Unit: "all office, clerical and technical employees of the respondent in the Township of King, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (18 employees in unit) (*Having regard to the agreement of the parties*)

2408-90-R: Ontario Public Service Employees Union (Applicant) v. Lake of the Woods Child Development Centre (Respondent)

Unit: "all employees of the respondent in the District of Kenora, save and except supervisors, persons above the rank of supervisor, the Executive Secretary, the A/P Payroll Officer and the M.I.S. Secretary" (25 employees in unit) (*Having regard to the agreement of the parties*)

2409-90-R: Ontario Public Service Employees Union (Applicant) v. Short Term Emergency Program (Respondent)

Unit: "all employees of the respondent in the District of Kenora, save and except supervisors, persons above the rank of supervisor" (26 employees in unit) (*Having regard to the agreement of the parties*)

2416-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. Philmor Group Ltd. (Respondent)

Unit: "all employees of the respondent at 130 Rosedale Valley Road in the Municipality of Metropolitan Toronto, save and except Property Manager, persons above the rank of Property Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

2482-90-R: Ontario Public Service Employees Union (Applicant) v. St. Francis Memorial Hospital Association (Respondent)

Unit: "all employees of the respondent at Barry's Bay, Ontario, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, paramedical employees, office and clerical staff, and employees in bargaining units for which any trade union held bargaining rights as of December 13, 1990" (55 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

2487-90-R: Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 880 (Applicant) v. Canadian Welding & Manufacturing Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Windsor, save and except foremen, persons above the rank of foreman, office and sales staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

2554-90-R: Hospitality, Commercial & Service Employees Union, Local 73 of the Hotel Employees & Restaurant Employees International Union (Applicant) v. Vincenzo & Cosimo Comisso, c.o.b. Magicuts (Respondent)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except Manager, persons above the rank of Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

2574-90-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Mediacom Inc. (Respondent)

Unit: "all employees of the respondent in the City of Ottawa, save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1289-90-R: The Employees Union of Brenning Construction (1986) Ltd. (Applicant) v. Brenning Construction (1986) Ltd. (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, office and clerical staff, and construction labourers" (18 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	19
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	0

1616-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Lambton County Board of Education (Respondent)

Unit: "all teacher assistants employed by the respondent in the County of Lambton, save and except superintendents, persons above the rank of superintendent, and employees in bargaining units for which any trade union held bargaining rights as of September 21st, 1990" (79 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	85
Number of persons who cast ballots	72
Number of ballots excluding segregated ballots cast by persons whose name appears on voters' list	68
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	49
Number of ballots marked against applicant	19
Ballots segregated and not counted	4

2007-90-R: International Union United Plant Guard Workers of America, Local 1962 (Applicant) v. Ontario Food Terminal Board (Respondent) v. Group of Employees (Objectors)

Unit: "all security guards employed of the respondent at 165 The Queensway in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	5

2033-90-R: International Union of Operating Engineers, Local 796 (Applicant) v. Toronto District Heating

Corporation (Respondent) v. The Canadian Union of Operating Engineers & General Workers, Local 101 (Intervener)

Unit: "all Stationary Engineers and their Helpers employed by the respondent in the Municipality of Metropolitan Toronto, at the Walton Street Steam Plant, save and except the Chief Engineer and Assistant Chief Engineer and persons above the rank of Chief Engineer and Assistant Chief Engineer" (13 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	12
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	3
Ballots segregated and not counted	1

2083-90-R: Canadian Union of Public Employees (Applicant) v. Scarborough General Hospital (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Unit: "all employees of the respondent in Scarborough employed as Stationary Engineers, save and except Chief Engineer and persons above the rank of Chief Engineer" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	1

2135-90-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. S & R Department Store (1976) Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Kingston, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff and security staff" (52 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	48
Number of persons who cast ballots	34
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	16

2333-90-R: Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses - York Branch (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the Victorian Order of Nurses - York Branch, Newmarket, save and except supervisors, persons above the rank of supervisor" (65 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	65
Number of persons who cast ballots	61
Number of ballots marked in favour of applicant	32
Number of ballots marked against applicant	29

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1610-90-R: Service Employees' International Union, Local 204 affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Saint Luke's Place (Respondent)

Unit: "all employees of the respondent in Cambridge, regularly employed for not more than 24 hours per

week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered, graduate and undergraduate nurses, professional medical staff, paramedical employees, activation director and office and clerical employees” (52 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	26
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	10
Ballots segregated and not counted	1

1826-90-R: Ontario Public Service Employees Union (Applicant) v. Madame Vanier Children's Services (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: “all office and clerical employees of the respondent in London, regularly employed for not more than 24 hours per week, save and except the Human Resources Assistant, persons above the rank of Human Resources Assistant and secretary to the Executive Director” (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

1865-90-R: Hospitality, Commercial & Service Employees Union, Local 73 of the Hotel Employees & Restaurant Employees International Union (Applicant) v. Tara Lynn Ltd. c.o.b. as First Choice Haircutters (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the City of Thunder Bay, save and except assistant managers, persons above the rank of assistant manager” (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	2
Ballots segregated and not counted	2

2107-90-R: Alliance Employees' Union (Applicant) v. Environment Component, Public Service Alliance of Canada (Respondent) v. Environment Component Employees' Union (Intervener)

Unit: “all employees of the respondent with the exclusion of the executive assistant” (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	6
Number of ballots marked in favour of intervener	0

Applications for Certification Dismissed Without Vote

3166-88-R: Labourers' International Union of North America, Local 183 (Applicant) v. New Professional Carpenters (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Intervener) (3 employees in unit)

2391-89-R: Laundry & Linen Drivers & Industrial Workers Union, Local 847, Affiliated with the Interna-

tional Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. ABS Woodworking Ltd. (Respondent) v. Group of Employees (Objectors) (55 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0250-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Mollenhauer Ltd. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener #1) v. Metropolitan Toronto Apartment Builders Association (Intervener #2)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry, except the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	3

2477-87-R: Canadian Union of Public Employees (Applicant) v. Governing Council of the University of Toronto (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the University of Toronto in the Province of Ontario, save and except persons who exercise managerial functions or are employed in a confidential capacity in matters related to labour relations; persons employed in the Royal Conservatory of Music in Toronto and persons employed by the Federated Universities; faculty which includes all professorial ranks, research associates, librarians, lecturers, senior tutors, tutors, instructors; teaching assistants and all persons employed in a teaching capacity, including teaching fellows and markers; engineers, doctors, dentists, architects or lawyers who are entitled to practice in Ontario and are employed in a professional capacity; students employed as part of an educational cooperative work programme or persons employed in government wage subsidy programs, such as Futures, Entry and Re-entry, but not including Innovations, for not more than six months; persons for whom any trade union held bargaining rights as of March 28, 1988; persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3,721 employees in unit)

Number of names of persons on revised voters' list	3,108
Number of persons who cast ballots	2,458
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	917
Number of ballots marked against applicant	1,182
Ballots segregated and not counted	356

0647-89-R: United Steelworkers of America (Applicant) v. Carleton University (Respondent) v. Canadian Guards Association (Intervener #1) v. Carleton University Security Officers' Association (Intervener #2)

Unit: "all employees in the security services department at Carleton University below the rank of Deputy Chief Security Officer and office staff" (28 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	24
Number of ballots marked in favour of intervener #1	16
Number of ballots marked in favour of intervener #2	8

1211-90-R: Independent Canadian Transit Union (Applicant) v. Hôpital Montfort (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Unit: "all employees of Hôpital Montfort at Ottawa, save and except professional medical staff, graduate

nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, technical personnel, office and clerical staff, supervisors, foremen, persons above the rank of foreman, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, plant superintendent, assistant plant superintendent and persons covered by a subsisting collective agreement between Hôpital Montfort and the International Union of Operating Engineers, Local 796" (215 employees in unit)

Number of names of persons on revised voters' list	225
Number of persons who cast ballots	128
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	120
Number of segregated ballots cast by persons whose names do not appear on voters' list	8
Number of ballots marked in favour of applicant	59
Number of ballots marked in favour of intervener	61
Ballots segregated and not counted	8

2061-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Novatronics Inc. (Respondent) v. International Brotherhood of Electrical Workers, Local 2345 (Intervener)

Unit: "all employees of the respondent at Stratford, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, purchasing and sales staff, nurses, security guards, calibration technicians and persons regularly employed for not more than 15 hours per week" (60 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	58
Number of persons who cast ballots	57
Number of ballots marked in favour of applicant	21
Number of ballots marked in favour of intervener	36

2099-90-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Heritage House Retirement Home (Respondent)

Unit: "all employees of the respondent in Mississauga, save and except supervisors, persons above the rank of supervisor" (51 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	44
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	23
Ballots segregated and not counted	1

2339-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Burgess Wholesale Ltd. (Respondent) v. Association of Employees of Burgess Wholesale Ltd. (Intervener)

Unit: "all employees of the respondent in the Town of Newmarket, save and except forepersons, persons above the rank of foreperson, inventory control clerk, janitorial and maintenance staff, office and sales staff" (77 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	77
Number of persons who cast ballots	75
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	15
Number of ballots marked in favour of intervener	57
Ballots segregated and not counted	2

2407-90-R: Service Employees' International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Ruse Travel Agency Ltd., D.B.A. Woodside Travel Services (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except Managers, persons above the rank of Manager, Administrative Assistant, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	5

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1396-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Witherell & Sons Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	7

1915-90-R: Teamsters Local Union 419 (Applicant) v. Ideal Plumbing Group Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (76 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	75
Number of persons who cast ballots	65
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	53

2169-90-R: United Steelworkers of America (Applicant) v. Rio Algom Ltd. or Atlas Alloys, a Division of Rio Algom Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, sales, technical, clerical employees, and students employed during the school vacation period and students employed in a co-operative training program" (98 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

Number of names of persons on revised voters' list	103
Number of persons who cast ballots	101
Number of ballots marked in favour of applicant	42
Number of ballots marked against applicant	59

Applications for Certification Withdrawn

0314-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. H.J. McFarland Construction Company, A Division of George Wimpey Canada Ltd. (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 247 (Intervener)

1295-90-R: United Steelworkers of America (Applicant) v. Obus Forme Ltd. (Respondent) v. Group of Employees (Objectors)

1444-90-R: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Hillmark Corporation and B.Y.C. Homes Ltd. (Respondents)

1755-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Konvey Construction Co. Inc. (Respondent)

1943-90-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. 733233 Ontario Inc. (Respondent)

2042-90-R: PME Contractors Employees Union (Applicant) v. P.M.E. Contractors Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 1687 (Intervener)

2097-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Tel-Con, a Division of 876611 Ontario Ltd. (Respondent)

2114-90-R: Labourers' International Union, Local 1059 (Applicant) v. Tel-Con, a Division of 876611 Ontario Ltd. (Respondent)

2230-90-R: Public Service Alliance of Canada (Applicant) v. Unitarian Service Committee of Canada (USC Canada) (Respondent)

2354-90-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Oxford County Board of Education (Respondent)

2413-90-R: Canadian Union of Public Employees, Local 1281 (Applicant) v. Council of The York Student Federation Inc. (AKA York Federation of Students) (Respondent)

2427-90-R: Hotel, Motel & Restaurant Employees Union, Local 442 (Applicant) v. 816036 Ontario Ltd. o/a Howard Johnson Motor Lodge and Perkins Restaurant (Respondent)

2428-90-R: Hotel, Motel & Restaurant Employees Union, Local 442 (Applicant) v. Sheraton Fallsview, Hotel & Conference Centre (Respondent)

2496-90-R: Energy & Chemical Workers Union (Applicant) v. Hughes Containers Ltd. (Respondent)

2498-90-R: IWA - Canada (Applicant) v. Timberjack Inc. (Respondent)

2528-90-R: Laundry & Linen Drivers & Industrial Workers Union, Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 656508 Ontario Ltd. c.o.b. as the Skylon Tower (Respondent)

2674-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Des'Build Development Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1366-90-FC: IWA-Canada, Local 2693 (Applicant) v. G. Henderson Distributors Manitoba Ltd. (Respondent) (*Dismissed*)

1872-90-FA: Teamsters, Local Union 419 (Applicant) v. Arrow Games Inc. (Respondent) (*Granted*)

1226-90-FC: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (C.L.C., A.F.L. - C.I.O.) (Applicant) v. London Free Press Printing Company Ltd. (Respondent) (*Withdrawn*)

2164-90-FC: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Kraus Carpet Mills Ltd. (Respondent) (*Granted*)

2223-90-FC: Canadian Paperworkers Union (Applicant) v. Grant Industries Corp. and Grant Forest Products Corp. c.o.b. as Grant Forest Products (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0359-90-R: United Steelworkers of America (Applicant) v. CMIL Industries Inc. & General Freezer (Respondents) (*Withdrawn*)

0711-90-R: Labourers' International Union of North America, Local 247 and Labourers' International Union of North America, Ontario Provincial District Council on behalf of its affiliated Local Unions 183, 247, 491, 493, 527, 597, 607, 625, 837, 1036, 1059, 1081 & 1089 (Applicant) v. George Wimpey Canada Ltd. and H.J. McFarland Construction Company Ltd. (Respondents) (*Withdrawn*)

1136-90-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Elteck Electrical Contracting Ltd. and J. D. Olsen Contracting Ltd. (Respondents) (*Withdrawn*)

2092-90-R: Bakery Confectionery & Tobacco Workers' International Union, Local 284 (Applicant) v. Shaw Baking Company Ltd. and 663656 Ontario Ltd. (Respondents) (*Withdrawn*)

2180-90-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059 (Applicant) v. Wil-Mat Holdings Ltd. and 876611 Ontario Ltd. (Respondents) (*Withdrawn*)

2370-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Wil-Mat Holdings Ltd.; 876611 Ontario Ltd. c.o.b. as Tel-Con (Respondents) (*Withdrawn*)

2490-90-R; 2491-90-R: Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local 428 (Applicant) v. Midway Industries Ltd., G.B. Midwind Ltd., 174388 Canada Inc., 772996 Ontario Inc., Midway Lanning and G.T. Lanning Ltd. (Respondents) (*Dismissed*)

2663-90-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Paul Smyth Flooring Ltd. and 383572 Ontario Ltd. c.o.b. as 'The Peppercorn Company' (Respondents) (*Granted*)

SALE OF A BUSINESS

0711-90-R: Labourers' International Union of North America, Local 247 and Labourers' International Union of North America, Ontario Provincial District Council on behalf of its affiliated Local Unions 183, 247, 491, 493, 527, 597, 607, 625, 837, 1036, 1059, 1081 & 1089 (Applicant) v. George Wimpey Canada Ltd. and H.J. McFarland Construction Company Ltd. (Respondents) (*Withdrawn*)

1136-90-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Elteck Electrical Contracting Ltd. and J. D. Olsen Contracting Ltd. (Respondents) (*Withdrawn*)

2002-90-R: Teamsters Local No. 990, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Palm Dairies Ltd., Beatrice Foods Inc. & 4170776 Alberta Ltd. (Respondents) (*Withdrawn*)

2091-90-R: Bakery Confectionery & Tobacco Workers' International Union, Local 284 (Applicant) v. Shaw Baking Company Ltd. (Respondents) (*Withdrawn*)

2180-90-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059 (Applicant) v. Wil-Mat Holdings Ltd. and 876611 Ontario Ltd. (Respondents) (*Withdrawn*)

2370-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Wil-Mat Holdings Ltd.; 876611 Ontario Ltd. c.o.b. as Tel-Con (Respondents) (*Withdrawn*)

2437-90-R: Delta 70 Shop Union Association (Applicant) v. Delta Wire Manufacturing (Respondent) (*Withdrawn*)

2490-90-R; 2491-90-R: Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local 428 (Applicant) v. Midway Industries Ltd., G.B. Midwind Ltd., 174388 Canada Inc., 772996 Ontario Inc., Midway Lanning and G.T. Lanning Ltd. (Respondents) (*Dismissed*)

2663-90-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Paul Smyth Flooring Ltd. and 383572 Ontario Ltd. c.o.b. as 'The Peppercorn Company' (Respondents) (*Granted*)

CROWN TRANSFER ACT

0408-89-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Natural Resources and Byrnes Surveys (Nick Miller) (Respondents) (*Withdrawn*)

2474-89-R: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Agriculture & Food (Alfred College of Agriculture & Food Technology) and 608507 Ontario Inc. (Randy J. Leroux Security) (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATION BARGAINING RIGHTS

2278-89-R: T. O'Leary Construction Corp. (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondent) (*Withdrawn*)

0290-90-R: Mark Rea on his own behalf and on behalf of a group of employees of Markus Construction (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local 93 (Respondent) v. 688996 Ontario Inc. o/a Markus Construction (Pembroke) (Intervener)

Unit: "all journeymen and apprentice carpenters employed by the employer in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	13
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	8
Ballots segregated and not counted	2

0354-90-R: Devon Sheriff (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. 759505 Ontario Inc. c.o.b. as Mount Pleasant I.G.A. (Intervener)

Unit: "all employees employed by the company, save and except the two Store Owners, Store Manager, Meat

Department Manager, Assistant Store Manager, Bakery Department Manager, Head Cashier/Bookkeeper, persons above the rank of these ranks, and persons regularly employed for not more than 24 hours per week and students employed during the summer vacations" (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

0561-90-R: Peter Sourtzis (Applicant) v. United Steelworkers of America (Respondent) v. Allan Windows (Intervener) (66 employees in unit) (*Dismissed*)

0968-90-R: John Murphy, representing a Group of Employees employed by Mike's Painting & Decorating, A Division of Michael A McManon's Painting & Decorating Ltd. (Applicant) v. International Brotherhood of Painters & Allied Trades, Local 1891 (Respondent)

Unit: "all employees of the employer, save and except non-working foremen and those above the rank of non-working foreman, engaged in work covered by the collective agreement" (15 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

1435-90-R: Rhonda Gilbraith (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Morgan Welding Supply Company, a division of Morgan Industries Inc. (Intervener) (*Withdrawn*)

1524-90-R: David Storm (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 141 (Respondent) v. Hay Stationery Inc. (Intervener) (23 employees in unit) (*Dismissed*)

1740-90-R: Theresa Martin (Applicant) v. United Food & Commercial Workers International Union, AFL:-CIO:CLC: (Respondent) v. Vitto Brand Foods Ltd. (Intervener)

Unit: "all employees of Vitto Brand Foods Ltd., Sudbury, save and except foreman, persons above the rank of foreman, office and clerical staff, and students employed during the school vacation period" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	3

2154-90-R: John Chernechuk (Applicant) v. Retail, Wholesale & Department Store Union, Local 414 (Respondent) v. Queensway Electric Supply Co. (Intervener) (4 employees in unit) (*Granted*)

2267-90-R: Staff at Cafe Contempra (Applicant) v. Hotels, Clubs, Restaurant, Tavern Employees Union, Local 261 (Respondent) (*Withdrawn*)

2318-90-R: Clifford March et al (Applicant) v. International Brotherhood of Painters & Allied Trades (Respondent) v. Nor-Vac Industrial Service Ltd.; L.S. Kosowan Ltd. (Intervener) (*Withdrawn*)

2353-90-R: Steve Cochrane (Applicant) v. Retail, Wholesale & Department Store Union, Local 414 (Respondent) v. Western Inventory Service Ltd. (Intervener) (19 employees in unit) (*Dismissed*)

2381-90-R: Employees of Hamilton Civic Hospital Employees Co-operative Child Care Centre Inc. (Applicant) v. Canadian Union of Public Employees (Respondent) (*Withdrawn*)

2500-90-R: Joe Kirk, Gabe Lameiro, Earl Tompkins (Applicants) v. United Steelworkers of America, Local 6922 and/or United Steelworkers of America, Local 7193 (Respondents) (3 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2384-90-U: The Corporation of Massey Hall & Roy Thomson Hall (Applicant) v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto and Jim Fuller (Respondents) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0016-88-U; 0957-88-U: Canadian Guards Association (Complainant) v. Pinkerton's of Canada Ltd. (Respondent) (*Withdrawn*)

3201-88-U: Sylvia Gronka (Complainant) v. Hotel, Motel & Restaurant Employees Union, Local 75 (Respondent) v. Westin Hotel (Intervener) (*Dismissed*)

0691-89-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. New Professional Carpenters & Labourers' International Union of North America, Local 183 (Respondent) (*Dismissed*)

1369-89-U: United Steelworkers of America (Complainant) v. A-Sharp Services Inc./Services A-Sharp Inc. (Respondent) (*Withdrawn*)

1745-89-U: International Brotherhood of Painters & Allied Trades, Local 1824 (Complainant) v. Mike's Painting & Decorating Ltd. (Respondent) (*Granted*)

2122-89-U: Eileen V. Wesley (Complainant) v. Ontario Public Service Staff Union (Respondent) (*Withdrawn*)

2134-89-U: Chris Butler, Robin Askin & John Murphy (Complainants) v. International Brotherhood of Painters & Allied Trades, Local 1824 (Respondent) (*Dismissed*)

2092-90-R: Bakery Confectionery & Tobacco Workers' International Union, Local 284 (Applicant) v. Shaw Baking Company Ltd. and 663656 Ontario Ltd. (Respondents) (*Withdrawn*)

2699-89-U: Niango Bapem (Complainant) v. John MacDonald (Respondent) v. Labourers' International Union, Local 1267 (Intervener) (*Withdrawn*)

2784-89-U: Laundry & Linen Drivers & Industrial Workers Union, Local 847 (Complainant) v. ABS Woodworking Ltd. (Respondent) (*Withdrawn*)

3079-89-U: Teamsters Local Union 419 (Complainant) v. Arrow Games Inc. (Respondent) (*Withdrawn*)

0126-90-U: Douglas Gavin (Complainant) v. Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Respondent) (*Withdrawn*)

0367-90-U: Pritam Grewal (Complainant) v. United Electrical Radio & Machine Workers of Canada, Local 550 (Respondent) v. Camco Inc. (Intervener) (*Dismissed*)

0489-90-U: David Fowler (Complainant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Sarnia) (Respondent) v. Michael McCabe and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Interveners) (*Withdrawn*)

0839-90-U: Canadian Paperworkers Union (Complainant) v. Mel Hall Transport Ltd. and 444024 Ontario Ltd. (Respondents) (*Granted*)

0852-90-U: Service Employees Union, Local 268 (Complainant) v. Sault Ste. Marie General Hospital and Paul Hawn (Respondents) (*Withdrawn*)

0938-90-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Western Inventory Service Ltd. (Respondent) (*Withdrawn*)

1170-90-U: Guillaume Kibale (Plaignant) c. Canadian Union of Educational Workers (Intemé) c. Université d'Ottawa (Intervenant) (*Dismissed*)

1209-90-U; 2256-90-U: Ontario Nurses' Association (Complainant) v. Caressant Care Nursing Home, Woodstock (Respondent) (*Withdrawn*)

1253-90-U: Ontario Public Service Employees Union, Local 249 (Complainant) v. Oaklands Regional Centre and Bonnie McKinnon (Respondents) (*Withdrawn*)

1269-90-U: The Alliance Employees' Union (Complainant) v. The Union of Public Works Employees (Respondent) (*Withdrawn*)

1292-90-U: Hotel, Motel & Restaurant Employees Union, Local 442 (Complainant) v. John Crothall Hospital Services (Respondent) (*Withdrawn*)

1326-90-U: United Steelworkers of America (Complainant) v. Obus Forme Ltd. (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

1356-90-U: Teamsters Local No. 419 (Complainant) v. Clarke's Produce Canada Ltd. (Respondent) (*Withdrawn*)

1361-90-U: The Union of Public Works Employees (Complainant) v. The Alliance Employees' Union (Respondent) (*Withdrawn*)

1367-90-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers Union of America - U.A.W. (Complainant) v. Zollner Canada Ltd. (Respondent) (*Withdrawn*)

1464-90-U: George E. Keefe (Complainant) v. Metropolitan Toronto Civic Employees', Local 43, Canadian Union of Public Employees (Respondent) v. The Corporation of the City of Toronto (Intervener) (*Withdrawn*)

1482-90-U: Sheet Metal Workers' International Association, Local 504 (Complainant) v. Metalbestos Erectors Ltd. (Respondent) (*Withdrawn*)

1487-90-U: Basavaraj (Bob) Patil (Complainant) v. Sunworthy Wallcoverings, A Division of Borden Company and Canadian Paperworkers Union, C.L.C., Local 304 (Respondent) (*Withdrawn*)

1530-90-U: Canadian Union of Public Employees and its Local Union 1140, C.L.C. (Complainant) v. The Corporation of the City of Timmins Golden Manor - Home for the Aged (Respondent) (*Dismissed*)

1614-90-U: Service Employees' Union, Local 210 (Complainant) v. Heritage Living Centres Ontario Inc. o/a Maplewood Manor Retirement Home (Respondent) (*Granted*)

1615-90-U: Service Employees' Union, Local 210 (Complainant) v. Heritage Living Centres Ontario Inc. (o/a Malcolm Place Retirement Residence) (Respondent) (*Granted*)

1623-90-U: Carlo Butera (Complainant) v. Nicolas Swec and Kenneth Williams Heaslip (Respondents) (*Dismissed*)

1624-90-U: Corporation of the Township of Charlottenburgh (Complainant) v. Canadian Union of Public Employees and its Local 3089 (Respondent) (*Withdrawn*)

1633-90-U: London & District Service Workers' Union, Local 220 (Complainant) v. Cedarwood Acres (Respondent) (*Withdrawn*)

1673-90-U: James C. Davies (Complainant) v. Local 122 - Canadian Union of Public Employees (Respondent) (*Withdrawn*)

1686-90-U; 1687-90-U: Service Employees' Union, Local 210 (Complainant) v. County of Kent, Thamesview Lodge (Respondent) (*Withdrawn*)

1750-90-U: Myrtle Bard, Nancy Monahan & Sandra Anderton (Complainants) v. Bakery Confectionery & Tobacco Workers Union, (AFL-CIO-CLC) and Dare Foods (Respondents) (*Withdrawn*)

1751-90-U: Mr. Pranas Sicilys (Complainant) v. Canadian Union of Public Employees, Local 3096 (Respondent) (*Withdrawn*)

1779-90-U: Service Employees' Union, Local 210 (Complainant) v. County of Bruce o/a Brucelea Haven Home for the Aged (Respondent) (*Withdrawn*)

1840-90-U: Jim McLachlan (Complainant) v. Donald Melvin (Respondent) (*Withdrawn*)

1886-90-U: Surjeet Chhokar (Complainant) v. Hotel employees, Restaurant Employees Union, Local 75, Caterair International, G. M. D. Saunders, Cargo Rd. International Airport, Toronto (Respondents) (*Withdrawn*)

1901-90-U: Ana Bilibruch (Complainant) v. United Rubber, Cork, Linoleum & Plastic Workers of America, Local 1043 and Plax Inc. (Respondents) (*Dismissed*)

1910-90-U: Canadian Union of Operating Engineers & General Workers (Complainant) v. Cadillac Fairview Corporation Ltd. (Respondent) (*Withdrawn*)

1924-90-U: United Food & Commercial Workers International Union, Local 175/633 (Complainant) v. 625051 Ontario Inc. c.o.b. Tillsonburg IGA (Respondent) (*Withdrawn*)

1929-90-U: Christian Labour Association of Canada (Complainant) v. Ray of Hope Inc. (Respondent) (*Withdrawn*)

1948-90-U: Canadian Union of Public Employees and its Local 3263 (Complainant) v. Windsor Coalition for Development Inc. (Chateau Park Lodge) (Respondent) (*Withdrawn*)

1960-90-U: Communications & Electrical Workers of Canada (Complainant) v. Optotek Ltd. (Respondent) (*Withdrawn*)

1988-90-U: Mark Herrington (Complainant) v. Paul Low (President C.U.P.E. 2840) (Respondent) (*Withdrawn*)

2021-90-U: Sheet Metal Workers' International Association, Local 537 (Complainant) v. Reno Marcon Plumbing & Heating Ltd. (Respondent) (*Withdrawn*)

2073-90-U: Carpenters Union, Local 2041 (Complainant) v. Ferano Construction Ltd. (Respondent) (*Dismissed*)

2089-90-U: Linda Lena Vail (Complainant) v. United Food & Commercial Workers International Union, Local 550A (Respondent) v. Cadbury Schweppes Ltd. (Intervener) (*Dismissed*)

2108-90-U: Lena Bolt (Complainant) v. Hotel Employees: Restaurant Employees Union, Local 75 of the Hotel Employees, Restaurant Employees International Union, A.F.L., C.I.O., O.F.L. (Respondent) (*Withdrawn*)

2117-90-U: Ontario Secondary School Teachers' Federation (Complainant) v. Lambton County Board of Education (Respondent) (*Withdrawn*)

2125-90-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Reebok Canada, a Division of Avreca International Inc. (Respondent) (*Withdrawn*)

2127-90-U: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (C.L.C., A.F.L. - C.I.O.) (Complainant) v. London Free Press Printing Company Ltd. (Respondent) (*Withdrawn*)

2155-90-U: Brian Lyons and Malcolm Bull, Stewards, Local 244 OPSEU (Complainants) v. Ronald J. Martin, President, Local 244 OPSEU and Frank Baron, Doug Boulton, Leslie Butler, Bill Crichton, David Crown and James Crossan, Executive Members, Local 244 OPSEU (Respondents) (*Withdrawn*)

2171-90-U: International Brotherhood of Electrical Workers, Local 1687 (Complainant) v. P.M.E. Contractors Ltd. (Respondent) (*Withdrawn*)

2251-90-U: Richard Petitpas (Complainant) v. International Association of Machinists & Aerospace Workers, Lodge 235 (Respondent) (*Withdrawn*)

2252-90-U: Robert Morgan (Complainant) v. Claude Beaudry (Respondent) (*Dismissed*)

2269-90-U: Shashin Goswami (Complainant) v. Greyhound Lines of Canada Ltd., and Amalgamated Transit Union, Local 1415 (Respondents) (*Withdrawn*)

2282-90-U: United Brotherhood of Carpenters & Joiners of America, Local 2041 and Chuck Huckabone (Complainants) v. Nation Drywall Contractors Ltd. and PCL Constructors Eastern Inc. (Respondents) (*Withdrawn*)

2285-90-U: James Crowe (Complainant) v. U.F.C.W. and Steinbergs Inc. (Respondents) (*Withdrawn*)

2300-90-U: Will Gerard Brimacombe (Complainant) v. Clyde Sookram & Teamsters, Local 847 (Respondent) (*Withdrawn*)

2304-90-U: United Steelworkers of America (Complainant) v. Marlee Inc. c.o.b. as Centre D'Accueil Mon Chez Nous, Raymond, Chabot Inc., Unikcare Management Inc., Marcel and Diane Parent (Respondents) (*Withdrawn*)

2368-90-U: International Union of Operating Engineers, Local 793 (Complainant) v. J.D.R. Tools & Equipment, Division of 810332 Ontario Inc. (Respondent) (*Withdrawn*)

2388-90-U: Ontario Nurses' Association (Complainant) v. St. Joseph's Hospital, Parry Sound (Respondent) (*Withdrawn*)

2403-90-U: Bakery, Confectionery & Tobacco Workers International Union, Local 322 (Complainant) v. Branson Bakery Ltd. (Respondent) (*Withdrawn*)

2406-90-U: The Amalgamated Transit Union, Local 1572 (Complainant) v. McDonnell-Ronald Limousine Service Ltd. o/a Airline Limousine Services Ltd., Nick Lemonis and John Limnidis (Respondents) (*Withdrawn*)

2440-90-U: International Union of Operating Engineers, Local 793 (Complainant) v. 876611 Ontario Ltd. c.o.b. as Tel-Con (Respondent) (*Withdrawn*)

2492-90-U: Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local 428 (Complainant) v. David Lanning, Gary Bromberg, Nicole Grimard, G.T. Lanning Ltd., Midway Industries Ltd., G.B. Midwind Ltd., 174388 Canada Inc., 772996 Ontario Inc., and Midway Lanning (Respondents) (*Withdrawn*)

2504-90-U: Pietro Cavaleri (Complainant) v. Gino Sisera, Legante Construction (Respondent) (*Dismissed*)

2524-90-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Airline Motor Hotel Ltd. (Respondent) (*Withdrawn*)

2525-90-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Valhalla Inn (Thunder Bay) (Respondent) (*Withdrawn*)

2672-90-U: Jacinta Miaco (Complainant) v. Eurita Ashley (Brucefield Manor) (Respondent) (*Dismissed*)

2682-90-U: Milenko Dropulic (Complainant) v. United Electrical, Radio & Machine Workers of Canada (*Dismissed*)

2788-90-U: R. J. Marcinyshyn (Complainant) v. Canadian National Railway & Canadian Signals & Communications Union (Respondent) (*Dismissed*)

JURISDICTIONAL DISPUTES

2258-87-JD: The Electrical Power Systems Construction Association (Complainant) v. Ontario Sheet Metal Workers' Conference and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada (Respondents) (*Dismissed*)

2968-89-JD: International Association of Machinists & Aerospace Workers, Lodge 412 (Complainant) v. E.B. Eddy Forest Products Ltd., Hull & Ottawa Mills (Respondent) (*Withdrawn*)

1652-90-JD: R.W. McKay Construction Inc. (Complainant) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 and Ontario Sheet Metal Workers & Roofers Conference and Sheet Metal Workers' International Association, Local 539 (Respondents) (*Withdrawn*)

1932-90-JD: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Complainant) v. The Electrical Power Systems Contractors Association, Pro-Mart Industrial Products Ltd. and International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Respondents) (*Dismissed*)

2305-90-JD: International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Complainant) v. Ontario Sheet Metal Workers' & Roofers Conference Sheet Metal Workers' International Association, Local 397 and Lakehead Insulation Contracting (1981) Ltd. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0467-90-M: C.U.P.E., Local 2828 (Applicant) v. United Counties of Prescott-Russell (Respondent) (*Granted*)

1954-90-M: Energy & Chemical Workers Union (Applicant) v. Serviplast Inc. (Respondent) (*Withdrawn*)

2204-89-M: Loeb IGA Southgate (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (*Granted*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2039-88-OH: International Association of Machinists & Aerospace Workers, Local 409 (Complainant) v. Boise Cascade Canada Ltd. (Respondent) (*Withdrawn*)

1911-89-OH: Teamsters Chemical Energy & Allied Workers, Local 154 (Complainant) v. Norton Advanced Ceramics of Canada Inc. (Respondent) (*Withdrawn*)

3229-89-OH: Chris Martin - Welder 'A' Employee (Complainant) v. ABB Combustion Engineering Fossil Systems Inc. (Respondent) (*Dismissed*)

0518-90-OH: Roy Druer (Complainant) v. Benn Iron Foundry (Respondent) (*Withdrawn*)

0559-90-OH: Linda Eden (Complainant) v. Benn Iron Foundry (Respondent) (*Withdrawn*)

1143-90-OH: Tim V. Pauley (Complainant) v. Village Pool & Spa (Respondent) (*Granted*)

2060-90-OH: Brett Allan McHugh (Complainant) v. Al Farmer, Farmboro Inc. (Respondent) (*Withdrawn*)

2231-90-OH: Patrick Hamilton (Complainant) v. John Beals (Norwester Resort Hotel) (Respondent) (*Withdrawn*)

2232-90-OH: Gary Hamilton (Complainant) v. John Beals (Norwester Resort Hotel) (Respondent) (*Withdrawn*)

2341-90-OH: Sher Kariz (Complainant) v. Perly's Maps Ltd. (Respondent) (*Withdrawn*)

2497-90-OH: Bridge Ramdewar (Complainant) v. Diversey Inc. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2040-89-G: United Brotherhood of Carpenters & Joiners of America (Applicant) v. T. O. Leary Construction Corp. (Respondent) (*Withdrawn*)

0476-90-G: Labourers' International Union of North America, Local 247 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. H.J. McFarland Construction Co. Ltd. (Respondent) (*Withdrawn*)

1007-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ideal Railings Ltd. (Respondent) (*Dismissed*)

1137-90-G: International Brotherhood of Electrical Workers, Local 1687 (Applicant)^b v. Elteck Electrical Contracting Ltd. and J. D. Olsen Contracting Ltd. (Respondent) (*Withdrawn*)

1182-90-G: The Ontario Provincial Council, United Brotherhood of Carpenters & Joiners of America, Local 1316 (Applicant) v. Kap's Interior Contracting Ltd. (Respondent) (*Withdrawn*)

1647-90-G: Labourers' International Union of North America, Local 607 (Applicant) v. Lebrun Northern Contracting Ltd. (Respondent) (*Withdrawn*)

1764-90-G: International Brotherhood of Painters & Allied Trades, Local 205 (Applicant) v. Presot Painting & Drywall Ltd. (Respondent) (*Granted*)

1818-90-G: Ontario Allied Construction Trades Council and its affiliate International Union of Operating Engineers, Local 793 (Applicant) v. Electrical Power Systems Construction Association, Ontario Hydro (Respondents) (*Dismissed*)

1984-90-G: Sheet Metal Workers' International Association, Local 397 (Applicant) v. Lakehead Insulation Contracting (1981) Ltd. (Respondent) v. International Association of Heat & Frost Insulators & Asbestors Workers, Local 95 (Intervener) (*Withdrawn*)

2074-90-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Ferano Construction Ltd. (Respondent) (*Granted*)

- 2085-90-G; 2336-90-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Dufferin Roofing Ltd. (Respondent) (*Granted*)
- 2165-90-G:** Labourers' International Union of North America, Local 1089 (Applicant) v. Facca Construction Company Ltd. (Respondent) (*Withdrawn*)
- 2189-90-G:** Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. R.T. Tile Company (Respondent) (*Withdrawn*)
- 2190-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Dalacoustics Contractors Ltd. (Respondent) (*Withdrawn*)
- 2209-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Servello Carpentry Ltd. (Respondent) (*Granted*)
- 2218-90-G:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Consolidated Drywall & Acoustics Ltd. (Respondent) (*Withdrawn*)
- 2234-90-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Galrich Contracting Ltd. (Respondent) (*Withdrawn*)
- 2245-90-G:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Four Seasons Drywall Systems & Acoustics Ltd. (Respondent) (*Withdrawn*)
- 2248-90-G:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Studcon Drywall & Acoustics Ltd. (Respondent) (*Withdrawn*)
- 2264-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Finspan Construction Ltd. (Respondent) (*Granted*)
- 2279-90-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Adelaide Electric (Respondent) (*Withdrawn*)
- 2281-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 and Chuck Huckabone (Applicants) v. Nation Drywall Contractors Ltd. (Respondent) (*Withdrawn*)
- 2302-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Valley Interiors (Respondent) (*Withdrawn*)
- 2308-90-G; 2310-90-G; 2376-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Finlandia Sauna & Steam (Respondent) (*Withdrawn*)
- 2309-90-G; 2311-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Van Horne Construction Ltd. (Respondent) (*Withdrawn*)
- 2312-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. P. A. Scaffolding Inc. (Respondent) (*Withdrawn*)
- 2313-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Hussey Seating Co. (Canada) Ltd. (Respondent) (*Withdrawn*)
- 2327-90-G:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Gulf Lathing & Drywall Company (Respondent) (*Granted*)
- 2345-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. SGB 2000 Inc. (Respondent) (*Withdrawn*)

2346-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Murphy Construction (833833 Ontario Ltd.) (Respondent) (*Withdrawn*)

2348-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Conformco Inc. (Respondent) (*Withdrawn*)

2349-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

2351-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Fapp-Co Contractors Ltd. (Respondent) (*Dismissed*)

2359-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. York Framing (Respondent) (*Granted*)

2364-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Frankwall Interiors Co. (Respondent) (*Withdrawn*)

2367-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. G.L. Drain Inc. and G.L. Trenching Ltd. (Respondents) (*Granted*)

2373-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Twinborn Construction (Paving) Ltd. (Respondent) (*Granted*)

2374-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. New Vision Construction Co. Ltd. (Respondent) (*Withdrawn*)

2377-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Bradsil (1967) Ltd. (Respondent) (*Withdrawn*)

2398-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. 854858 Ontario Inc. (Respondent) (*Granted*)

2421-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Smith Bros. Excavating (Windsor) Ltd. (Respondent) (*Granted*)

2429-90-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Elevator Company (Respondent) (*Withdrawn*)

2439-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. AMF All Seasons Excavating, Division of Sharon Advertising & Research of Canada Ltd. (Respondent) (*Granted*)

2441-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Roseway Construction Ltd. (Respondent) (*Granted*)

2454-90-G; 2664-90-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Paul Smyth Flooring Ltd. and 383572 Ontario Ltd. o/a 'The Peppercorn Company' (Respondents) (*Granted*)

2465-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Dominion Paving Ltd. (Respondent) (*Granted*)

2469-90-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 20 (Applicant) v. Limen Masonry Ltd. (Respondent) (*Withdrawn*)

2495-90-G: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Zanatta Elia & Sons Construction Ltd. (Respondent) (*Granted*)

- 2503-90-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Aries Electric (Respondent) (*Withdrawn*)
- 2512-90-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Gamen Paving & Contracting Ltd. (Respondent) (*Granted*)
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ONTARIO LABOUR RELATIONS BOARD REPORTS

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Petition - Termination - Whether petition voluntary expression of employee wishes - Petition posted on lunchroom bulletin board for one hour - Several signatures obtained on company premises during working hours - No cogent evidence concerning circumstances in which one signature obtained - One signer, although in bargaining unit, likely perceived by bargaining unit employees to be closely allied to management - Board not satisfied that petition representing voluntary expression of employee wishes - Application dismissed

KENT DRUGS LIMITED; RE BONNIE SAWYER AND FELLOW EMPLOYEES; RE R.W.D.S.U., LOCAL 414, AFL:CIO:CLC: 321

Practice and Procedure - Adjournment - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Issues raised by grievance raising jurisdictional dispute - Board adjourning consideration of grievance pending filing and disposition of jurisdictional dispute complaint

PCL CONSTRUCTORS EASTERN INC.; RE I.U.O.E., LOCAL 793; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 527 AND OPERATING ENGINEERS EMPLOYERS BARGAINING AGENCY AND THE METROPOLITAN TORONTO DEMOLITION CONTRACTORS INC. 354

Practice and Procedure - Employee Reference - Union requesting that Board determine under section 106(2) of the *Act* whether unnamed nurses allegedly referred to individual hospitals through respondent nursing agency are employees of the individual hospitals - Board declining union request that Vice-Chair be appointed to convene pre-hearing conference - Board indentifying various questions raised by application and directing Registrar to schedule matter for hearing

CARECOR HEALTH SERVICES, INC., ONTARIO HOSPITAL ASSOCIATION, BAYCREST HOSPITAL, CANADIAN RED CROSS BLOOD TRANSFUSION, CENTENARY HOSPITAL, CENTRAL HOSPITAL, CLARKE INSTITUTE OF PSYCHIATRY, DONWOOD INSTITUTE, ETOBICOKE GENERAL HOSPITAL, GEORGE ST. L. MCCALL CHRONIC CARE, HILLCREST HOSPITAL, HUMBER MEMORIAL HOSPITAL, LYNDBURST HOSPITAL, MOUNT SINAI HOSPITAL, NORTH YORK GENERAL HOSPITAL, NORTHWESTERN GENERAL HOSPITAL, PRINCESS MARGARET HOSPITAL, PROVIDENCE VILLA AND HOSPITAL, QUEEN ELIZABETH HOSPITAL, QUEENSWAY GENERAL HOSPITAL, SCARBOROUGH GENERAL HOSPITAL, ST. JOSEPH'S HEALTH CENTRE, ST. MICHAEL'S HOSPITAL, SUNNYBROOK MEDICAL CENTRE, TORONTO EAST GENERAL ORTHOPAEDIC HOSPITAL, TORONTO GENERAL HOSPITAL, TORONTO WESTERN HOSPITAL, WELLESLEY HOSPITAL, WEST PARK HOSPITAL, WOMEN'S COLLEGE HOSPITAL, YORK-FINCH GENERAL HOSPITAL; RE O.N.A. 298

Practice and Procedure - Evidence - Plant manager discharged after testifying for employer -

Union seeking to call plant manager as its witness in reply - Union counsel not ascertaining whether witness would recant earlier testimony but inviting Board to hear him anew so that it could weigh his credibility and that of other witnesses - Board ruling proffered evidence not proper reply evidence

SUMNER PRESS LTD.; RE WINDSOR PRINTING PRESSMAN AND ASSISTANTS' UNION, LOCAL 274

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Practice and Procedure - First Contract Arbitration - Parties - Employer, federal and provincial governments, and certain Indian Bands entering into "Dona Lake Agreement" prior to union's certification - Agreement establishing, *inter alia*, employment guarantees and training opportunities for native workers as well as dispute settlement mechanism - Employer taking position in bargaining that terms and conditions for native workers determined by "Dona Lake Agreement" - Employer refusing to recognize union's bargaining authority within meaning of section 40a(2)(a) of the *Act* - Board also exercising discretion under section 40a(2)(d) of the *Act* - First contract arbitration directed - Board denying Indian Bands standing to intervene in section 40a proceeding without prejudice to their right (if any) to make submission to arbitrator

PLACER DOME INC.; RE U.S.W.A.

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Related Employer - Construction Industry - Construction Industry Grievance - Lock-Out - Remedies - Sale of a Business - Unfair Labour Practice - Board issuing single employer declaration and directing respondent companies to apply full terms and conditions of applicable collective agreements - Board allowing grievances and awarding compensation - Board issuing cease and desist order and directing reinstatement of union members with compensation

PRESTON & LIEFF GLASS LIMITED, PRESTON & LIEFF GLASS CONTRACTS INC., PRESTON & LIEFF GLASS (1988) LIMITED, PRESTON & LIEFF DOOR LTD.; RE P.A.T., LOCAL 200

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Remedies - Construction Industry - Construction Industry Grievance - Lock-Out - Related Employer - Sale of a Business - Unfair Labour Practice - Board issuing single employer declaration and directing respondent companies to apply full terms and conditions of applicable collective agreements - Board allowing grievances and awarding compensation - Board issuing cease and desist order and directing reinstatement of union members with compensation

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Representation Vote - Certification - Applicant union seeking new representation vote on ground that its name appeared on ballot in English only - Applicant union aware prior to vote that its name was to appear on ballot in English only but failing to request that name appear in English and French - Board not convinced that reasonable voter would be unable to distinguish between applicant and intervener because applicant's name appearing in English only - Board declining to direct new vote

HOPITAL MONTFORT; RE I.C.T.U.; RE I.U.O.E., LOCAL 796

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Sale of a Business - Bargaining Rights - Bargaining Unit - Bill 109 creating new Ottawa/Carleton French Language School Board out of parts of four predecessor English language school boards - Legislation also deeming intermingling and directing Board to exercise its discretion under subsections 63(6) and (8) of the *Labour Relations Act* as to the appropriate shape of bargaining rights after the transfer - Shape of maintenance bargaining unit in issue - Board rejecting argument that bargaining rights for maintenance workers should attach to

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OTTAWA-CARLETON FRENCH LANGUAGE SCHOOL BOARD (FULL BOARD),
THE, THE OTTAWA-CARLETON FRENCH LANGUAGE SCHOOL BOARD
(CATHOLIC SECTOR), AND THE OTTAWA-CARLETON FRENCH LANGUAGE
SCHOOL BOARD (PUBLIC SECTOR); RE C.U.P.E.; RE OTTAWA BOARD OF
EDUCATION EMPLOYEE'S UNION (OBEEU); RE SERVICE & COMMERCIAL
EMPLOYEES UNION, LOCAL 272; RE THE CARLETON ROMAN CATHOLIC
SEPARATE SCHOOL BOARD EMPLOYEES' ASSOCIATION

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Sale of a Business - Construction Industry - Construction Industry Grievance - Lock-Out -
Related Employer - Remedies - Unfair Labour Practice - Board issuing single employer
declaration and directing respondent companies to apply full terms and conditions of appli-
cable collective agreements - Board allowing grievances and awarding compensation - Board
issuing cease and desist order and directing reinstatement of union members with compen-
sation

PRESTON & LIEFF GLASS LIMITED, PRESTON & LIEFF GLASS CONTRACTS
INC., PRESTON & LIEFF GLASS (1988) LIMITED, PRESTON & LIEFF DOOR
LTD.; RE P.A.T., LOCAL 200

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Termination - Construction Industry - Petition - Named applicant in style of cause and only per-
son signing processed Form 17 not at work on application date - Union moving to dismiss
termination application - Board noting reference to "other employees" in style of cause and
relying on paragraph at bottom of petition as demonstrating intention of all signators to be
applicants - Board rejecting union's motion to dismiss - Board finding petition voluntary -
Vote ordered

RO-VON CONSTRUCTION LIMITED; RE BOB KENNEDY AND OTHER
EMPLOYEES OF RO-VON CONSTRUCTION LIMITED; RE I.U.O.E., LOCAL 793 ..

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Termination - Employees discharged, allegedly for cause, casting ballots in Board ordered termi-
nation vote - Ballots segregated - Discharges grieved but arbitration unlikely to occur
before year-end - Whether ballots ought not to be counted - Whether new vote ought to be
conducted - Board determining that outcome of termination application must await out-
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SIDBROOK PRIVATE HOSPITAL; RE ANN GRATTON; RE O.N.A.

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Termination - Petition - Whether petition voluntary expression of employee wishes - Petition
posted on lunchroom bulletin board for one hour - Several signatures obtained on company
premises during working hours - No cogent evidence concerning circumstances in which one
signature obtained - One signer, although in bargaining unit, likely perceived by bargaining
unit employees to be closely allied to management - Board not satisfied that petition repre-
senting voluntary expression of employee wishes - Application dismissed

KENT DRUGS LIMITED; RE BONNIE SAWYER AND FELLOW EMPLOYEES; RE
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Unfair Labour Practice - Change in Working Conditions - Union and employer parties to 12 year
collective bargaining relationship - Employer never paying maturity and promotional
increases according to provisions of expired collective agreement during statutory freeze -
Whether in breach of freeze provision in the *Act* - Board rejecting employer argument that
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SPAR AEROSPACE LIMITED; RE SPAR PROFESSIONAL AND ALLIED TECHNICAL EMPLOYEES ASSOCIATION

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Unfair Labour Practice - Discharge - Employer and grievor disputing propriety of grievor submitting brief to Commission of Inquiry - Employer requiring grievor to agree to certain conditions or face discharge - Grievor accepting conditions, but insisting on right to refer issue to arbitration - Grievor discharged - Whether unfair labour practice - Board determining that grievor discharged for reasons unrelated to his attempted exercise of right under the *Act* to grieve - Complaint dismissed

TORONTO STAR NEWSPAPERS LIMITED; RE SOUTHERN ONTARIO NEWSPAPER GUILD, LOCAL 87, THE NEWSPAPER GUILD.....

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Unfair Labour Practice - Construction Industry - Construction Industry Grievance - Lock-Out - Related Employer - Remedies - Sale of a Business - Board issuing single employer declaration and directing respondent companies to apply full terms and conditions of applicable collective agreements - Board allowing grievances and awarding compensation - Board issuing cease and desist order and directing reinstatement of union members with compensation

PRESTON & LIEFF GLASS LIMITED, PRESTON & LIEFF GLASS CONTRACTS INC., PRESTON & LIEFF GLASS (1988) LIMITED, PRESTON & LIEFF DOOR LTD.; RE P.A.T., LOCAL 200

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2449-90-R Ontario Public Service Employees Union, Applicant v. Air-Dale Limited, Respondent v. Group of Employees, Objectors

Certification - Constitutional Law - Whether airline providing scheduled air service wholly owned by provincial crown agency falling within provincial jurisdiction for labour relations purposes - Operations of airline falling squarely within field of aeronautics - Board holding that airline's employees' labour relations within federal jurisdiction - Certification application dismissed

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *D. A. MacDonald* and *P. V. Grasso*.

APPEARANCES: *David Wright* and *Sherry Currie* for the applicant; *Terrence O'Connell* and *Michael Restoule* for the respondent; *Ian F. Gold* and *Brian St. Germain* for the objectors.

DECISION OF THE BOARD; March 4, 1991

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Through discussions with a Board Officer, the parties reached partial agreement with respect to the description and composition of the bargaining unit. The language upon which they have agreed is "all employees of the respondent working at or out of Sault Ste. Marie and Timmins, save and except the chief pilot, the chief flight attendant, persons above the rank of chief pilot and chief flight attendant, office staff, and persons regularly employed for not more than twenty-four (24) hours per week". It is the respondent's position that dispatchers should be excluded from the bargaining unit on the basis of lack of community of interest, and that the classifications of check pilot and base captain should also be excluded from the bargaining unit (and thus replace the classification of chief pilot as the base exclusion for pilots) on the grounds that they exercise managerial functions. The applicant, on the other hand, contends that check pilots, base captains, and dispatchers should all be included in the bargaining unit. The parties are in agreement, for purposes of clarity, that "dispatchers are not office staff".
4. In addition to the documentary evidence of membership filed by the applicant in support of this application, there were filed with the Board three petitions in opposition to the application. The Board generally takes such petitions into account in deciding whether to exercise its discretion under section 7(2) of the Act to order a representation vote notwithstanding documentary evidence of membership which demonstrates that more than fifty-five per cent of the employees in the bargaining unit are "members" within the meaning of section 1(1)(l) of the Act. In this case, however, even if the petitions are entirely voluntary, the applicant will still have the unequivocal support of more than fifty-five per cent of the employees in the bargaining unit (regardless of whether the aforementioned disputed classifications are included or excluded). Accordingly, it is unnecessary to undertake the inquiry (into the origination of the petitions and the manner in which each of the signatures on them was obtained) contemplated by section 73 of the Board's Rules of Procedure since, in the circumstances of this case, the Board would not be prepared to exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote, even if the petitions were found to be entirely voluntary.
5. In a letter dated February 2, 1991, Stephen R. Daniel, who represented the objectors at the January 31, 1991 meeting with the Board Officer, raised a number of matters regarding this application and the organizing campaign which preceded it. However, Mr. Daniel was not in atten-

dance at the February 7, 1991 hearing of this matter and Ian F. Gold, who served as spokesperson for the objectors at that hearing, advised us that the objectors did not intend to pursue before the Board any of the matters raised in that letter. Accordingly, it is neither necessary nor appropriate for the Board to comment upon any of those matters.

6. If the respondent's operations fall within provincial (constitutional) jurisdiction for labour relations purposes, it would be appropriate for the Board to appoint a Board Officer to enquire into the aforementioned disputes concerning the description and composition of the bargaining unit, and for the Board to exercise its discretion under section 6(2) of the Act to certify the applicant (on an interim basis) as bargaining agent for all employees of the respondent working at or out of Sault Ste. Marie and Timmins, save and except the chief pilot, the chief flight attendant, persons above the rank of chief pilot and chief flight attendant, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and pending the final determination of the matters in dispute, excluding as well dispatchers, check pilots, and base captains.

7. To assist the Board in determining whether or not it has jurisdiction in respect of this matter, the parties agreed upon the following facts:

Air-Dale Limited ("Air-Dale") is a wholly owned subsidiary of the Ontario Northland Transportation Commission ("Ontario Northland"), and Air-Dale is an Ontario business corporation. Ontario Northland is a Crown agency in the Province of Ontario. Ontario Northland acquired all of the outstanding and issued shares of Air-Dale in November of 1988 by a share purchase agreement. Air-Dale is licenced by Transport Canada under the *Aeronautics Act* and Regulations to fly scheduled air service. Prior to 1988, Air-Dale was an independent contractor of Ontario Northland operating a scheduled air service. Ontario Northland is the owner of the registered trade mark "norOntair". Ontario Northland leases two Dash-8 aircraft and four Twin Otter aircraft to Air-Dale. Ontario Northland also provides scheduled air service via Twin Otter aircraft in northwestern Ontario, and these scheduled air services are contracted out to an independent contractor (which is presently Bearskin Lake Air Service Limited). These services are provided by two Twin Otter aircraft owned by Ontario Northland and leased to the independent contractor. Peter Dymant is the President of Ontario Northland and also the President of Air-Dale. The Commissioners of Ontario Northland are appointed by Order-in-Council and are presently seven in number (the Chairman plus six Commissioners). These Commissioners are also identical in name and number to the Directors of Air-Dale. Ontario Northland, under the trade mark "norOntair", provides air service by two Dash-8 (37 passenger) aircraft, six Twin Otter (19 passenger) aircraft, and one Navaho Chieftain. It leases two Dash-8 aircraft and four Twin Otter aircraft to Air-Dale, which is licensed by Transport Canada under the *Aeronautics Act* and Regulations to fly these aircraft. NorOntair provides air service to twenty-three points in Ontario and one point in Manitoba (Winnipeg). Air-Dale provides air service to eighteen of these points (including Winnipeg), and air service to the other five points in northwestern Ontario is provided by Bearskin Lake Air Service Limited.

8. On the agreement of the parties, a copy of Ontario Northland's 1989 Annual Report was submitted to the Board (and entered as an exhibit) to provide background information on

Ontario Northland and its air services. A copy of the norOntair timetable (effective October 28, 1990) was also entered as an exhibit on the agreement of the parties.

9. The Board received oral evidence from Dave Weber, who was called as a witness by the applicant. Mr. Weber has been employed by Air-Dale as a pilot and check pilot for sixteen and a half years. The respondent and the objectors elected to neither cross-examine him nor call any other witnesses. Thus, we find the following additional facts to have been established by his uncontradicted testimony. Air-Dale's only major asset is the aforementioned licence from Transport Canada. The maintenance of the planes operated by Air-Dale is contracted out to Sky Services. The hangar is owned by Ontario Northland. The equipment used to maintain the planes is owned by either Sky Services or Ontario Northland. Parts are purchased through Ontario Northland, as are office supplies. Although Air-Dale has a free hand to order small items, all major purchases must be approved by Ontario Northland. After conferring with Air-Dale's pilots and crew members, Air-Dale's chief pilot takes their salary and wage proposals to Ontario Northland for approval. Thus, the salaries and wages for all of Air-Dale's pilots and crew members are ultimately set by Ontario Northland.

10. Ontario Northland's aforementioned 1989 Annual Report (the "Report") includes the following "President's Report":

Throughout almost 90 years of service, Ontario Northland has been the predominant supplier of essential transportation and communication services across the province's vast northern territory. In 1989 we created new Development and Tourism departments to enable the company to take a high-profile leadership position in both of these fields.

Our progress in Development has been exciting. Construction will start on a new rail/bus terminal in Cochrane with a small but high-quality hotel component in 1990. We've also begun work on a new bus terminal/office complex building in Kirkland Lake. Downtown development on land formerly occupied by the ONR rail yard is proceeding in Timmins and we are examining opportunities for various projects in Moosonee. In 1990 we will officially open our new, state-of-the-art, rail/bus terminal in North Bay. Several other projects are in the early study stages.

Although our rail, bus, marine and air services have always figured prominently in our northern tourism industry, the creation of our "Be My Guest In Northern Ontario" marketing and promotion campaign has generated considerable consumer awareness and consideration for our unique northern tourist experiences. Though the campaign is targeted specifically toward Chi-Cheemaun, Nindawayma and Chief Commanda marine services, Northlander and Polar Bear Express Services and various elements of norOntair and ON Bus products, we have worked closely with our regional tourism associations to promote all of the North's tourist amenities.

In telecommunications, we're ahead of schedule with the laying of the fibre optic cable between Timmins and North Bay and we continue to provide quality communication services with state-of-the-art equipment.

In 1989 our shops in North Bay continued the construction of new rail cars turning out three passenger cars and the first of three electric auxiliary power units.

An early retirement program was developed to take effect in the spring of 1990 to trim our work force to face leaner and more challenging conditions for the rest of the decade and respond to the expected loss of iron ore pellet traffic. Opportunities will be created to train and promote younger staff to help Ontario Northland take advantage of new and exciting commercial ventures for the future.

Respectfully submitted,

"P. A. Dymont"

Peter A. Dymont
President and CEO

11. Separate pages in the Report are devoted to telecommunications, development, rail services, air services, marine services, and transport services. The air services page contains the following information:

Airline service in the North continues to change radically after de-regulation. Carriers, trying to establish new routes and schedules, initiated, changed or suspended services constantly and the rate of change accelerated with the fortunes of the northern economy.

norOntair was established in 1973 to ensure a basic level of scheduled air service was provided in the North. We continue to fill this role despite the fact that some of our service communities cannot generate commercially-viable passenger loads.

Though some subsidized service is, and will continue to be a fact, our goal is to maximize revenues over our entire route structure and reduce the need for support to the absolute minimum. In 1989 we substantially reduced the passenger subsidy rate.

To achieve our objective, schedules to many communities were improved during the year and Dash-8 service extended to as many destinations as possible, including Fort Frances and Winnipeg. We're now competing effectively with business-class fares on Dash-8 routes and we've added a wide range of discount fares throughout the norOntair system and joint discount fares with Canadian Airlines and Air Canada carriers. As a result of these initiatives, norOntair recorded the highest-ever annual revenue of over \$9-million.

Since the demand for business air travel is tied so closely to the north's resource-based economy, the outlook is uncertain. However, we are developing new initiatives aimed at the high-end hunting and fishing tourist market with plans for co-marketing ventures with major outfitters. Test projects for specific target markets in conjunction with the "Be My Guest in Northern Ontario" campaign indicate potential for the generation of new tourism business from foreign sources.

12. The financial report section of the Report indicates that in 1989, Ontario Northland had total assets of \$280,488,000, of which norOntair aircraft constituted \$15,943,000 and other norOntair property constituted \$3,940,000. It also indicates that Ontario Northland's total operating revenues for 1989 were \$142,573,000, of which air services sales revenue constituted \$10,203,000 and Government reimbursement (pursuant to a Memorandum of Understanding between Ontario Northland and the Ministry of Northern Development and Mines, which designates certain Ontario Northland operations as non-commercial) constituted \$4,500,000. The deduction of operating expenses of \$12,674,000 from the air services total revenue of \$14,703,000 yielded an income of \$2,029,000 from air services, which represents approximately 14% of Ontario Northland's total operating income of \$14,136,000.

13. Neither the Report nor the norOntair timetable distinguishes between norOntair flights operated by Air-Dale and those operated by Bearskin Lake Air Services Limited. That norOntair services are to some extent integrated with those of Air Canada and Canadian Airlines Interna-

tional is evident from the norOntair timetable, which lists not only destinations that can be reached by norOntair flights alone, but also numerous destinations which can be reached via norOntair flight connections with Air Canada and Canadian Airlines International flights. The timetable also indicates that reservations on norOntair flights can be made through Air Canada and Canadian Airlines International.

14. Counsel for the applicant acknowledged that, as a result of many years of constitutional caselaw, aeronautics is a matter of federal jurisdiction and, accordingly, the regulation of labour relations in respect of aeronautics is presumptively also a matter of federal jurisdiction. However, he submitted that the respondent is an integrated and integral component of Ontario Northland's larger single undertaking, which provides transportation, communication, and tourism services in northern Ontario. In support of that contention, counsel referred the Board to the opening paragraph of the above-quoted President's Report, which describes Ontario Northland as "the predominant supplier of essential transportation and communication services across the province's vast northern territory". He also referred the Board to the third paragraph of the President's Report, as well as to a number of the other facts set forth above. Thus, although he expressly indicated that he was not asking the Board to find Ontario Northland to be the employer of the employees affected by this application, it was his contention that Air-Dale is a non-severable and non-distinct portion of the indivisible provincial undertaking of Ontario Northland, a provincial Crown agency whose operations (he submits) should all be found to fall within provincial jurisdiction for labour relations purposes. In support of that position, applicant's counsel referred (by way of analogy) to *National Protective Service Company Limited*, [1987] OLRB Rep. Feb. 245; *Fleetwide*, [1986] OLRB Rep. Sept. 1216; *Westburne Industrial Enterprises Ltd.*, [1984] OLRB Rep. Oct. 1525; and *Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1083. He also sought to distinguish the Court of Appeal for Ontario judgment dated January 28, 1991 in the *Ontario Hydro* case (in which the majority set aside the June 12, 1989 Divisional Court decision quashing the decision of the Board (differently constituted) in *Ontario Hydro*, [1988] OLRB Rep. Feb. 187), on the grounds that the argument which he is asking the Board to adopt in these proceedings does not appear to have been made in that case.

15. The respondent elected not to present any argument as to the Board's jurisdiction, and simply took the position that "the decision of jurisdiction rests with the Board". In speaking on behalf of the objectors, Mr. Gold advised the Board that the question of the Board's jurisdiction is "not a major difficulty" with the objectors. Thus, the objectors also elected to take no position on that matter.

16. The regulation of contracts of employment, hours of work, minimum wages, and other aspects of employment law, including labour relations, is generally a matter of "Property and Civil Rights in the Province", within the meaning of section 92(13) of the *Constitution Act* and, accordingly, is generally within the jurisdiction of the provincial legislatures (see *Toronto Electric Commission v. Snider*, [1925] 2 D.L.R. 5 (J.C.P.C.); *Re Northern Electric Company Limited*, 63 CLLC ¶15,484; and *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. Feb. 272; application for judicial review dismissed in *Re Windsor Airline Limousine Services Ltd. and Ontario Taxi Association 1688 et al.* (1981), 30 O.R. (2d) 732 (Div. Ct.); leave to appeal denied, September 15, 1980). However, the federal Parliament has jurisdiction over the regulation of labour relations and employment in works, undertakings, or businesses that are within its legislative authority (see *Re Industrial Relations and Dispute Investigation Act (Can.)*, [1955] S.C.R. 529). Thus, there is a sphere of federal labour law jurisdiction in respect of employees of employers who are engaged in enterprises that are within federal jurisdiction, such as those set forth in section 91 and in parts (a), (b), and (c) of section 92(10) of the *Constitution Act*. Parliament has exercised that jurisdiction by enacting legislation that governs labour relations in various federal

areas of activity. See, for example, the *Canada Labour Code*, R.S.C. 1985, c. L-2, section 4 of which provides:

This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of such employees or employers.

The Code's section 2 definition of "federal work, undertaking or business" includes, in part (e), "aerodromes, aircraft or a line of air transportation".

17. In *Northern Telecom Ltd. v. Communications Workers of Canada et al.* (1979), 98 D.L.R. (3d) 1 (S.C.C.), at page 13, Dickson J. (as he then was) wrote, in part, as follows in delivering the unanimous judgment of the Court:

The best and most succinct statement of the legal principles in this area of labour relations is found in Laskin's *Canadian Constitutional Law*, 4th ed. (1975), p. 363:

In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional value they are within provincial competence; and, secondly, in so far as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry or enterprise...

In an elaboration of the foregoing, Mr. Justice Beetz in *Montcalm Construction Inc. v. Minimum Wage Com'n et al.* (1978), 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754, 25 N.R. 1, set out certain principles which I venture to summarize:

(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of a 'going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

See also *Windsor Airline Limousine Services Limited*, *supra*, at paragraph 25, in which the Board stated:

Regulatory control of labour relations on a federal level can be exerted only in respect of activities which fall within federal authority by specific reference, (see *Eastern Canada Stevedoring Limited* [1955] S.C.R. 529; [1955] 3 D.L.R. 721), by reference to the federal general or residu-

ary power (see *Pronto Uranium Mines Ltd. and Algoma Uranium Mines Limited v. Ontario Labour Relations Board*, [1956] O.R. 862; 5 D.L.R. (2d) 341), by the exercise of federal authority by a declaration under section 92(10)(c) of the B.N.A. Act, or by direct relation to federal government operations and federal Crown enterprises, (see *Reference re Legislative Jurisdiction Over Hours of Labour*, [1925] S.C.R. 505; [1925] 3 D.L.R. 1114).

18. The approach which has generally been adopted by the Courts (and by labour relations boards) in determining constitutional issues regarding the division of powers in respect of labour relations matters was aptly summarized by Paul C. Weiler, as Chairman of the British Columbia Labour Relations Board, in *Arrow Transfer Company Ltd.*, 74 CLLC ¶16,130, at 1079-1080:

They [the Courts] begin with the operation which is at the core of the federal undertaking (e.g. railway, shipping, or the postal service). They then look at the particular subsidiary operation engaged in by the employees whose collective bargaining is in question and reach a judgment about the relationship of that operation to the basic federal undertaking. The judges have used a variety of terms to characterize the part the particular operation may play in the over-all enterprise. It must have a 'vital', 'essential', 'integral', 'important', or 'intimate' role in the undertaking if it is to fall within the jurisdiction of Parliament. As was said earlier, that has been the conclusion about the relationship of stevedoring to shipping and of mail pick-up to the postal service; the opposite conclusion was reached regarding the relationship of a hotel to the railroad. In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure of the employment relationship.

In the *Northern Telecom* case, *supra*, at page 14, the Supreme Court of Canada described that passage as "a useful statement of the method adopted by the Courts in determining constitutional jurisdiction in labour matters".

19. The constitutional basis of the federal Parliament's jurisdiction over aeronautics is aptly described in the following passages from P.W. Hogg, *Constitutional Law of Canada* (2nd Ed., 1985), at pp. 495-6:

The subject of aeronautics is not governed by the same principles as apply to other modes of transportation. It started off on a different constitutional track because the first legislation was enacted by the federal Parliament to perform Canada's obligations under an international treaty. In the *Aeronautics Reference* (1931) [*Re. Regulation and Control of Aeronautics in Can.*, [1932] A.C. 54.], the Privy Council held that the legislation was valid by virtue of the treaty power in s. 132 of the Constitution Act, 1867. The possibility that the peace, order, and good government power might also sustain the legislation was suggested as an alternative basis of jurisdiction. This suggestion became important when the original treaty, which was a "British Empire" treaty to which s. 132 applied, was replaced by a new treaty, which was a "Canadian" treaty to which s. 132 did not apply; and it became necessary to attribute jurisdiction to some head of power other than the treaty power. In *Johannesson v. West St. Paul* ([1952] 1 S.C.R. 292), the Supreme Court of Canada held that the peace, order, and good government power gave the federal Parliament the claimed jurisdiction. This was on the basis that aeronautics was a distinct "matter" which satisfied the *Canada Temperance* test, that is to say, "it goes beyond local or provincial concern or interest and must from its inherent nature be the concern of the Dominion as a whole".

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Because jurisdiction over aeronautics has been held to depend upon its national dimension or national concern, the question whether a particular undertaking is interprovincial or merely local is probably irrelevant. There are obiter dicta in both the *Aeronautics Reference* and *Johannesson* to the effect that federal jurisdiction extends to purely intraprovincial airlines, and this has been distinctly decided by the British Columbia Court of Appeal in *Jorgenson v. North Vancouver Magistrates* [(1959) 28 W.W.R. 265]. The cases have not articulated any reasons for this result: it has simply been assumed that the stamp of "national concern" draws no distinction between the local and the long-distance operator. There is something to be said for this point of

view, although the courts' failure to explain why aeronautics (and no other mode of transportation) is a matter of national concern makes it hard to discern the limits of the doctrine. Perhaps the most plausible reason for subjecting local airlines to the same regime as the interprovincial and international airlines is the fact that both kinds of carriers share the same airspace and ground facilities, so that their operations are necessarily closely integrated. Divided control over navigation and ground facilities would be impossible....

20. The federal Parliament's legislative power over aeronautics does not extend to operations which merely have an incidental aeronautical connection. Thus, in *Toronto Auto Parks (Airport) Limited*, [1978] OLRB Rep. July 682, the Board found to be within provincial jurisdiction the labour relations of an employer which operated public parking facilities owned by the Federal Government at Toronto's Pearson International Airport. That employer's employees were responsible for operating public parking facilities at the airport, collecting parking fees from users of those facilities, keeping the parking areas and cashier booths clean, and retrieving baggage carts from where they were left by airline passengers in order to reposition them where they would be more readily available to the travelling public. In finding that it had jurisdiction in that case, the Board concluded that although the services provided "a convenience to the travelling public", they were not "sufficiently integral to aeronautics to bring them within federal legislative jurisdiction." A similar conclusion was reached in *Windsor Airline Limousine Services Limited*, *supra*, regarding employees of a company providing taxi services to and from various locations including the Windsor Airport. In *The Tower Company (1961) Ltd.*, [1979] OLRB Rep. June 583, the Board wrote, in part, as follows in rejecting an employer's contention that the maintenance services which its employees provided to a Federal Government air traffic controller training centre were an integral part of the centre's operation and accordingly fell within federal jurisdiction for labour relations purposes:

6. We are unable to accept the respondent's contention that its operations affected by this application come within Parliament's jurisdiction over aeronautics. The scope of the federal power over aeronautics does not extend to all operations which have some aeronautical connotation, but only to those which are an integral part of, or necessarily incidental to, actual aerial transport. See the *Toronto Auto Parks (Airport) Limited* case, [1978] OLRB Rep. July 682 and the authorities referred to therein. In our view the maintenance work at the training centre performed by the employees who are affected by this application is sufficiently removed from actual aerial transport so as to be outside of the federal jurisdiction over aeronautics....

See also the (as yet unreported) judgment of Abbey J. dated February 25, 1991, in *Mark Hyland v. The Crown in Right of Ontario*, Ontario Court of Justice (General Division) File No. 158/90.

21. In *Wardair Canada (1975) Ltd.*, [1979] 1 Can LRBR 49, the Canada Labour Relations Board, after reviewing the jurisprudence concerning the roots of the Federal Government's authority over aeronautics and concluding that the words contained in section 2(e) of the Canada Labour Code ("aerodromes, aircraft or a line of air transportation") accurately reflect the established scope of that authority, wrote in part as follows (at pp. 59-60) in holding that customer representatives employed by a travel industry wholesaler (Intervac), which operated tours and was wholly owned by the same company that owned Wardair, did not come within federal jurisdiction:

In the field of aeronautics there have been previous industrial relations and related issues of constitutional law considered by the courts. In *Murray Hill Limousine Service Limited v. Sinclair Batson et al.* (1965), 66 CLLC 14,143 (Que. Q.B.) porters employed by a company operating buses and taxis were held not to be covered by federal jurisdiction. The difficulty of the judgment is portrayed in brief passages from the various judgments. Rinfret, J. in dissent stated:

On the contrary, I believe that the porters' work, the service which they render to the airline companies' clients, is "intimately connected with", "necessarily incidental to the work, undertaking or business" and "activities" of the airlines, and that, in that

capacity, it must be considered as forming an integral part of their operations. In fact they are employees of the latter, the appellant being only an agent for the purpose of hiring and payment of wages.
(p. 540)

Taschereau, J. concluded to the contrary:

For the reasons given by Lord Reid, I come to the conclusion that the work performed by the appellant's employer, however useful it might be to airline companies and their passengers, was not an integral part of airline transportation any more than the restaurants, newsstands, hairdresser salons and bars installed in all large airports for the comfort and convenience of passengers. The plaintiffs work therefore falls within provincial jurisdiction.
(p. 542)

And Montgomery, J., also in the majority, stated:

Respondents were not employed by the airlines but by Appellant the principal business of which is the operation of buses and taxis. In the course of their duties they had no direct contact with aircraft. Their services were not provided for the passengers by the airlines as one of the services incidental to the purchase of a ticket, but the passenger engaged these services at his own discretion, he being free if he wished to carry his baggage himself or have it carried by a friend. I do not regard any of these factors as being in themselves conclusive, but taken together they satisfy me that Respondents' work did not relate to aeronautics sufficiently closely to bring them outside Provincial jurisdiction.
(pp. 542-3)

In *Re Colonial Coach Lines Ltd. et al. and Ontario Highway Transport Board et al.* (1967), 62 D.L.R. (2d) 270 (Ont. H.C.) Donohue, J. held that the federal government's authority over aeronautics did not extend to operation of a limousine service to and from an airport. The connection between the celestial and terrestrial was too remote for him in this case (appeal dismissed (1967), 63 D.L.R. (2d) 198 (Ont. C.A.)). In *Re City of Kelowna and Canadian Union of Public Employees Local No. 338* (1974), 42 D.L.R. (3d) 754 (B.C.S.C.) it was held the Canada Labour Code applied to municipal employees engaged in runway maintenance and administrative work related to an airport. In *Re Field Aviation Co. Ltd. and International Association of Machinists & Aerospace Workers Local Lodge 1579* (1974), 45 D.L.R. (3d) 751 (Alta. S.C.) it was held employees engaged in servicing, maintaining, inspecting, modifying, repairing, overhauling and certifying aircraft and parts as airworthy were covered by the Canada Labour Code.

In *Butler Aviation of Canada Limited v. International Association of Machinists and Aerospace Workers* (1975), [1975] F.C. 590 (C.A.); 76 CLLC 14,008 employees engaged in parking, refuelling, baggage handling and customer lounge facilities at the Montreal airport were held to be within the federal government's industrial relations jurisdiction. The court stated at pp. 541 and 41 "Obviously there is no clear cut test that can be applied in each instance" to determine if the necessary degree of attachment to the federal sector exists. The pattern of prior decision making reveals that in the field of aeronautics the intended scope of federal government authority is intended to be the core activity of "aerodromes, aircraft or a line of air transportation". A travel industry wholesale such as Intervac is most analogous to a travel agent and federal regulation of Intervac, and particularly its industrial relations, is not a necessary incident nor essential to federal government regulation of "aerial navigation". Notwithstanding the sibling relationship between Wardair and Intervac they are accepted and treated as having a distinctly different character under the Air Carrier Regulations. It is our judgment that the intended scope of the aeronautics authority does not reach to Intervac and that the industrial relations authority of the federal government is not triggered by Intervac's relationship to the airline travel business or its special working and financial relationship with Wardair, Canada's only exclusive charter carrier.

22. The application of the foregoing principles has also led to the following categories of employees being found to fall within federal jurisdiction over aeronautics: airport security personnel (*National Protective Service Company Limited, supra*, and *Agence de Securite Fortin Inc.,*

[1981] 3 Can LRBR 271 (Que. Lab. Ct.)), ramp attendants employed by a contractor to provide baggage and cargo loading and unloading services for Quebec Air (*Quebec-Sol Services Limitee* (1981)), [1982] 2 Can LRBR 369 (C.L.R.B.)), and employees of an aviation electronics company specializing in the repair and maintenance of avionic electronic black boxes on aircraft and ground based avionic equipment (*North Canada Air Ltd.* (1979)), [1980] 1 Can LRBR 535 (C.L.R.B.)).

23. The public nature of the respondent's owner, Ontario Northland, does not render either of them immune from the application of federal legislation: see, for example, *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at 429-30; and *Her Majesty in Right of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61, at 72. In the instant case, the operations of the respondent fall squarely within the field of aeronautics. Air-Dale is licenced by Transport Canada under the *Aeronautics Act* (and Regulations) to fly scheduled air service. Pursuant to that licence, it provides air service to seventeen points in Ontario and one point in Manitoba, using aircraft leased to it by Ontario Northland. Air-Dale's employees for whom the applicant seeks bargaining rights are pilots and flight attendants directly involved in supplying aerial transportation services to the public. The Board is not persuaded that the aeronautical services provided by the respondent are, for purposes of constitutional law, an integral component of a single transportation, communication, and tourism undertaking of Ontario Northland. To the contrary, Air-Dale's operations either constitute a distinct aeronautical undertaking in and of themselves, or (more likely) constitute a major component of Ontario Northland's "norOntair" aeronautical undertaking, which is a line of air transportation that falls within the ambit of federal legislative jurisdiction for labour relations purposes by virtue of the constitutional jurisprudence described above. This conclusion is consistent with both the majority judgment of Tarnopolsky J.A., with whom Lacourciere J.A. concurred, and with the dissenting judgment of Galligan J.A., in *Ontario Hydro, supra*, and will not create labour relations problems as the respondent's workforce is already separate from that of Ontario Northland (as well as from that of Bearskin Lake Air Services Limited).

24. For the foregoing reasons, the Board has concluded that the regulation of labour relations in respect of the employees of the respondent to which this application pertains is within federal jurisdiction. Accordingly, the *Labour Relations Act* does not apply. This application is therefore dismissed.

2888-90-FCA United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800, Applicant v. Bonik Incorporated, Respondent

Construction Industry - First Contract Arbitration - Interest Arbitration - Items in dispute including duration, geographic scope, payment of wages, lay-offs, sub-contracting, welders' qualifications, job site accommodation, apprentices, and health and welfare and pension contributions - Board making award on items in dispute

BEFORE: R. A. Furness, Vice-Chair, and Board Members H. Kobryn and J. A. Trim.

APPEARANCES: Joanne L. McMahon and Michael Zangari for the applicant; B. Nickolic for the respondent.

DECISION OF THE BOARD; March 28, 1991

1. In a decision dated January 30, 1991, in Board File 2702-90-FC, the Board directed that the settlement of the first collective agreement between the parties shall be by arbitration. In that decision, the Board also noted the agreement of the parties that the Board shall arbitrate the settlement of the first collective agreement.

2. The hearing with respect to the settlement of the first collective agreement by arbitration was held in Sudbury on February 20, 1991. The Board entertained the evidence and representations of the parties.

3. The applicant filed with the Board a proposed collective agreement that it was prepared to execute. The respondent did not file a proposed collective agreement that it was prepared to execute.

4. The parties agreed upon some of the provisions of the proposed collective agreement which had been filed by the applicant. The articles of the proposed collective agreement which were in dispute were as follows:

- (i) Duration of Agreement
- (ii) Article 3 - Geographic Scope
- (iii) Article 5.1 - Payment of Wages
- (iv) Article 7.2 - Lay-Off
- (v) Article 11.1 - Sub-Contracting
- (vi) Article 17 - Welder's Qualifications
- (vii) Article 23.8 - Job Stewards
- (viii) Article 25.1 - Job Site Accommodation
- (ix) Article 25.3 - Job Site Accommodation
- (x) Article 32.2 - Apprentices
- (xi) G. - Industrial Fund
- (xii) Additional Wording proposed by the Respondent.

5. The applicant has proposed a collective agreement which is in a standard form and has been signed by other employers engaged in residential construction. The signing of standard form or identical collective agreements between a trade union and employers engaged in the same type of construction is in recognition of the concept that in so far as wages and conditions of employment are concerned these elements have been removed from the competitiveness of these employers. Such a collective agreement becomes a neutral document. If it were otherwise and such employers were able to sign different collective agreements with the trade union, then the system of collective bargaining could not be sustained. With identical collective agreements each employer competes for available construction work based upon matters outside the collective bargaining relationship such as the skill and efficiency of management including the effective use of capital and equipment, reputation, efficient utilization of employees, supervision, contacts and skill in estimating jobs. The standard form or identical collective agreement secures the attainable objectives of a trade union and the employees in the bargaining unit, and, ensures that with respect to wages and conditions of employment such employers compete with each other on what may be

referred to as a level playing-field. The Board now considers each of the articles which are in dispute.

6. The proposal of the applicant in (i) is as follows:

DURATION OF AGREEMENT

This Agreement shall be effective for a period of two years from the day of , 1991 until the day of, 1993 and thereafter from year to year unless it is terminated by either party giving to the other party written notice that the Agreement shall be amended or terminated.

Such notice shall be given within ninety (90) days of, and not less than sixty (60) days prior to, the expiration of this Agreement.

The applicant argued that the proposed collective agreement should coincide with the collective agreement in the industrial, commercial and institutional sector and terminate on the same date, namely, April 30, 1992. The respondent agreed that the proposed collective agreement should be in force until April 30, 1992, without any automatic extension. The position of the applicant would mean that the proposed collective agreement would be for a period of less than two years. In our view it is not possible to make such an award. By the operation of section 40a(18) the collective agreement is to be effective for a period of two years. The position of the respondent completely misunderstands the position under the *Labour Relations Act* that even where a collective agreement terminates by its terms the bargaining rights nevertheless continue.

7. The proposal of the applicant in (ii) is as follows:

ARTICLE 3 - GEOGRAPHIC SCOPE

This Agreement shall be applicable to and effective within the jurisdictional area of Local 800, and shall inure to the benefit of, and be binding upon the parties hereto, and the members of the parties hereto, and upon all other parties executing this Agreement.

1. Complete district of: Manitoulin, (excluding portion of Manitoulin Island, West of a north to south line running 5 miles east of and parallel to 83 Longitude) Nipissing and Timiskiming.
2. Complete district of: Parry Sound, EXCEPT TOWNSHIPS Christie, Foley, Conger, Humphrey, Ferguson, McDougal, McKeller and Carling.
3. Complete district of: Cochrane, Kenora (Patricia Portion), Algoma and Sudbury except portions of the **WEST BOUNDARY**.

*West Boundary

Starts at a point, extreme north latitude, Hudson Bay, and 29.7 miles east of 83 longitude then south to 49 latitude - west to 5 miles east of 83 longitude and south to 30 miles north of 45 latitude.

The applicant seeks to have the geographic scope of this collective agreement the same as the standard form collective agreement. The respondent argued that the proposed collective agreement should not cover a greater geographic then the geographic area contained in the certificate of the Board which gave rise to the bargaining rights of the applicant and which underlie the instant application. In the decision of the Board dated April 11, 1989, a certificate issued to the applicant with respect to all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. The geographic scope in the standard form collective agreement is

as referred to earlier in this paragraph and is the jurisdictional area of the applicant. The geographic area in the certificate which was issued to the applicant is the Board's geographic area #17. It may well be that it has been the practice of the applicant to successfully expand the geographic area in a certificate to its own jurisdictional area by means of voluntary recognition. However, the securing of an expanded geographic scope in a collective agreement as a matter of a private agreement is one thing, the securing of such an expanded geographic scope in this application is quite another thing. In our view the position of the applicant is not sustainable. In *United Brotherhood of Carpenters and Joiners of America*, [1978] OLRB Rep. Aug. 776, the Board held that while a trade union may demand extended voluntary recognition and an employer may demand reduction of the geographical jurisdiction of the trade union, neither can take such issues to the point of impasse and make them the subject matter of a strike or lockout, because neither a trade union nor an employer may use economic sanctions to expand or retract bargaining rights. Given the jurisprudence of the Board under section 15, it is difficult to see why the position of the applicant should prevail over the position of the respondent. In our opinion the position of the respondent prevails over the position of the applicant.

8. The proposal of the applicant in (iii) is as follows:

ARTICLE 5 - PAYMENT OF WAGES

- 5.1 Wages shall be paid by cheque or cash not later than Thursday of each week. If paid by cheque on Thursday, and a Holiday occurs on Thursday, payment by cheque shall be on the preceding Wednesday.

The respondent would prefer to pay its employees every two weeks. The members of the applicant are accustomed to being paid every week and the Board finds no reason to interfere with that arrangement.

9. The proposal of the applicant in (iv) is as follows:

ARTICLE 7 - LAY OFF

- 7.2 The employee shall be paid in full, no later than two (2) hours prior to the end of the work day or work shift.

The respondent indicated that this clause is unduly onerous. Other contractors appear to have adjusted to a scheme whereby laid-off employees are paid in this way. The position of the applicant prevails on this article.

10. The proposal of the applicant in (v) is as follows:

ARTICLE 11 - SUB-CONTRACTING

- 11.1 Recognizing that the Contractor can sub-contract, no Contractor shall directly or indirectly sublet or sub-contract or otherwise transfer to any employee or any other employer not signatory to a U.A. agreement any of the work coming under the jurisdiction of this Agreement.

This provision is a standard provision in collective agreements in the construction industry and is designed to prevent an employer from sub-contracting to a non-union employer. The respondent did not advance any valid reason for deleting this provision. The position of the applicant prevails with respect to this article.

11. The proposal of the applicant in (vi) is as follows:

ARTICLE 17 - WELDER'S QUALIFICATIONS

- 17.1 Contractors requesting welders from the Union shall make known the type of welding that is required. The welders requested shall show adequate proof to the Contractors of previous experience, prior to testing, for the type of welding to be performed, or no remuneration shall be required.
- 17.2 Welders shall be paid from time of hire to completion of test at the regular rate of pay including all applicable benefits.
- 17.3 The Contractor shall provide proper shelter for the test, and test all men on the job site or in the employer designated shop. Welders working under the jurisdiction of the local Union shall cut and grind their own coupons on black pipe.

Alloy coupons may be sent out to be cut by power-saw and shall be returned for grinding by the member working the test.

If a member of the local Union is required to service a welding machine, then the proper safety equipment will be supplied for handling fuel.

The position of the applicant with regard to the testing of welders appeared to be reasonable and prevails over the position of the respondent over his apprehension over the supply of welders. The position of the applicant prevails.

12. The proposal of the applicant in (vii) is as follows:

ARTICLE 23 - JOB STEWARDS

- 23.8 Job Stewards shall have preferred seniority in the event of a reduction in work force where his qualifications are equal to the work to be performed.

It was the position of the applicant that this article is there for the protection of the steward who is the representative of the trade union. It was the position of the respondent that a steward could be laid off if there was no work for him. In our opinion there is some protection in the article for the respondent in what is a very common provision in collective agreements in the construction industry. The position of the applicant prevails.

13. The proposals of the applicant in (viii) and (ix) are as follows:

ARTICLE 25 - JOB SITE ACCOMMODATION

- 25.1 The Contractor agrees to provide on projects, sufficient lunch and changeroom facilities which shall be properly heated and kept in a clean and sanitary condition by both workmen and Contractor.
- • •
- 25.3 Decent toilets that are heated shall be provided or made available for the use of workmen from the start of the project and within reasonably easy access of their places of work so that there is at least one toilet for every twenty or fewer workmen on the project at any one time.

As the applicant pointed out, much of the wording here is to be found in the *Occupational Health and Safety Act* and regulations thereunder for construction projects. This fact, of course, does not guarantee the article as appropriate in the proposed collective agreement. The respondent objected to the article on the ground that it was too onerous. Having heard of the flexibility with which this article is interpreted, the Board finds that the provisions of this article are not too onerous and are to be included in the proposed collective agreement.

14. The proposal of the applicant in (x) is as follows:

ARTICLE 32 - APPRENTICES

- 32.2 The Apprenticeship ratio shall be set out by Sudbury and District Joint Apprenticeship Board. All Employers of Apprentices shall satisfy the Sudbury and District Joint Apprenticeship Board or the North-Eastern Joint Apprenticeship Committee of their qualifications to train Apprentices. Every third (3rd) member hired may be an Apprentice.

The respondent wanted to have a fifty-fifty ratio rather than a proportion of one in three. The applicant takes the position that this would give the respondent a competitive advantage. The respondent failed to advance any plausible reasons for a special article for itself. The position of the applicant prevails.

15. The proposal of the applicant in (xi) is as follows:

G. INDUSTRIAL FUND

Each Contractor bound by this Agreement shall contribute twenty five cents per hour for each hour earned by each employee covered by this Agreement and remit such contributions with Health, Welfare and Pension contributions.

Effective July 4, 1990 25

Benefit Contributions payable hereunder. Such amounts on receipt shall immediately be paid to the Association as each Employer's contribution for the general purposes of the Association including the costs of negotiating and administering this Agreement.

This provision is used to fund the activities of employers including the cost of negotiating the standard form collective agreement. The Board finds no reason to give the respondent a "free ride" on the industrial fund. The position of the respondent appears to be based upon philosophical and financial reasons. There is nothing before the Board which merits special treatment of the respondent. The position of the applicant prevails and this provision is to be included in the collective agreement.

16. The proposal of the respondent in (xii) is as follows:

The existing work that is committed to sub-contractors and is under construction and is under construction at present is not included in this agreement.

This is a proposal to add and not vary language in the proposed collective agreement. The proposed wording is imprecise and susceptible of various meanings. However, it is clear from the representations of the respondent that it is designed to secure special treatment. The Board finds no reason to place the respondent at an advantage with respect to any competitors, either actual or prospective. Moreover, the respondent has been aware of its outstanding bargaining obligations for almost two years. In all the circumstances, the Board is not prepared to confer an advantage on the respondent and the clause will not be included in the collective agreement.

17. Attached as an appendix to this decision is the collective agreement which is binding on the applicant and the respondent. The respondent ought to be bound by the terms and conditions of any collective agreement which may be negotiated to renew the standard form collective agreement (other than the expanded geographic area of the standard form agreement), until this settled agreement expires on March 28, 1993.

[Appendix omitted: Editor]

3084-90-M Ontario Nurses' Association, Applicant v. **Carecor Health Services Inc.**, Ontario Hospital Association, Baycrest Hospital, Canadian Red Cross Blood Transfusion, Centenary Hospital, Central Hospital, Clarke Institute of Psychiatry, Donwood Institute, Etobicoke General Hospital, George St. L. McCall Chronic Care, Hillcrest Hospital, Humber Memorial Hospital, Lyndhurst Hospital, Mount Sinai Hospital, North York General Hospital, Northwestern General Hospital, Princess Margaret Hospital, Providence Villa and Hospital, Queen Elizabeth Hospital, Queensway General Hospital, Scarborough General Hospital, St. Joseph's Health Centre, St. Michael's Hospital, Sunnybrook Medical Centre, Toronto East General Orthopaedic Hospital, Toronto General Hospital, Toronto Western Hospital, Wellesley Hospital, West Park Hospital, Women's College Hospital, York-Finch General Hospital, Respondents

Employee Reference - Practice and Procedure - Union requesting that Board determine under section 106(2) of the Act whether unnamed nurses allegedly referred to individual hospitals through respondent nursing agency are employees of the individual hospitals - Board declining union request that Vice-Chair be appointed to convene pre-hearing conference - Board indentifying various questions raised by application and directing Registrar to schedule matter for hearing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *R. M. Sloan* and *K. Davies*.

DECISION OF THE BOARD; March 21, 1991

1. This is said by the applicant to be an application for a determination under section 106(2) of the *Labour Relations Act*. More specifically, the applicant requests that the Board determine whether unnamed nurses who it alleges are referred to the individual hospitals "through" the respondent Carecor Health Services Inc., are employees of the individual respondent hospitals. To use the applicant's words, it "seeks the determination as to which employer is the employer of the nurses in question".

2. In its statement of background and relevant facts (Schedule C) the applicant asserts that:

• • •

19. The respondents have failed to recognize that nurses supplied to the respondent hospitals through agencies/registries including Carecor are employed under the relevant collective agreements and accordingly have failed to discharge their obligations to ONA as bargaining agent. In short the respondent hospitals have failed to recognize that they are the employers of nurses supplied to them through agencies/registries.

• • •

22. Subsection 9(1) of the *Hospital Labour Disputes Arbitration Act* ("HLDAA") reads as follows:

The board of arbitration shall examine into and decide on matters that are in dispute and any other matters that appear to the board necessary to be decided in order to conclude a collective agreement between the parties, but the board shall not decide any matters that come within the jurisdiction of the Ontario Labour Relations Board.

In view of the jurisdiction of this Board pursuant to Section 106 and other provisions of the *Labour Relations Act*, ONA submits that an interest Board of Arbitration under HLDAA is without jurisdiction to determine any matter within the jurisdiction of this Board including the determination of a recognition clause and/or such a question as 'who is the employer'. Therefore, any decision of an arbitrator or board of arbitration which purport [sic] to in any way reduced the scope of the recognition clause was clearly beyond the jurisdiction of such arbitrator or board of arbitration and therefore null and void pursuant to the provisions of the HLDAA and the *Labour Relations Act*.

23. Since 1985 the respondent hospitals on an incremental basis have expanded their utilization of agency/registry nurses far beyond that apparently contemplated by the 1985 Board of Arbitration. Agency/registry nurses are currently being used in the Metropolitan Toronto area and possibly in other areas throughout the province to replace full time equivalent nurses, thus eroding the bargaining unit presented by ONA. The degree of use and consequent erosion varies widely from hospital to hospital. The respondent and other hospitals have chosen to introduce Carecor into this situation. Carecor supplied these full time equivalent nurses as part of its service to the respondent hospitals.
24. On February 7, 1991, during the current round of collective bargaining with the Participating Hospitals, ONA served notice on the Participating Hospitals that it took the position that "all agency supplied nurses are employees of the hospital and, as such, are currently covered by the collective agreement...". It requested a response from the ONA as to its position on the question and served notice that, in the event of disagreement, "ONA will instruct counsel to bring an application before the Ontario Labour Relations Board under s. 106(2) of the *Labour Relations Act*. To date, neither the Ontario Hospital Association nor any of the Participating Hospitals, including the respondent hospitals, have responded to ONA.
25. ONA submits that the Board make the declaration requested, pursuant to Subsection 106(2), to assist the protection of stability in the hospital labour relations sector.

The applicant requests relief, in Schedule D, as follows:

1. Declaration that the respondents, or, any combination thereof, as may be deemed appropriate by the Board, constitute one employer for the purposes of the *Labour Relations Act*.
2. Damages bearing interest, payable to the Ontario Nurses' Association in compensation for losses sustained as a result of the failure of the respondents to recognize the Ontario Nurses' Association as bargaining agent for nurses supplied through agencies/registries to the respondent hospitals.
3. Damages bearing interest, payable to any affected nurses who have sustained any losses as a result of the failure of the respondents to recognized [sic] that said nurses are and have been employees within the meaning of the relevant collective agreements.
4. Direction that the respondents be jointly and severally liable for any damages awarded by the Board.
5. Direction that the respondents deliver to the Ontario Nurses' Association, hospital by hospital, on a weekly basis, a statement containing
 - (a) the names, addresses, telephone numbers of all nurses supplied through the respondent agencies/registries or any other agency/registry;
 - (b) the dates upon which and the number of hours worked by nurses supplied through the respondent agencies/registries or any other agency/registry;

- (c) the reason why agency/registry nurses were required in each case;
- (d) the amounts payable by the respondent hospitals to any agency/registry;
- (e) the amounts received by nurses supplied to the respondent hospitals through any agency/registry.

6. Direction that the relevant collective agreements be amended to reflect any declaration as may be made by the Board, pursuant to the request set out in paragraph 1 above.

7. Such other and additional relief as may be requested by counsel at the hearing of the matter and deemed appropriate by the Board.

3. The applicant refers to *Ontario Hydro*, [1981] OLRB Rep. July 931 as a case in which the Board has “asserted” jurisdiction with respect to a similar request.

4. Section 106(2) of the *Labour Relations Act* provides that:

...

(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

...

Sections 1(1)(i), (h), and 1(3)(b) provide that:

...

(h) “dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

(i) “employee” includes a dependent contractor;

...

(b) who, in the opinion of the Board, exercises managerial function or is employed in a confidential capacity in matters relating to labour relations

...

Sections 1(1)(b) and 1(2), and 2 of the *Hospital Labour Disputes Arbitration Act* provide that:

...

(1)(b) “hospital employee” means a person employed in the operation of a hospital;

...

(2) Unless the contrary intention appears, expressions used in this Act have the same meaning as in the *Labour Relations Act*.

2.-(1) This Act applies to any hospital employees to whom the *Labour Relations Act* applies, to the trade unions and councils of trade unions that act or purport to act for or on behalf of any such employees, and to the employers of such employees.

(2) Except as modified by this Act, the *Labour Relations Act* applies to any hospital employees to whom this Act applies, to the trade unions and councils of trade unions that act or purpose to act for or on behalf of any such employees, and to the employers of such employees.

• • •

5. In *Ontario Hydro, supra*, the applicant trade union requested that the Board determine whether or not some forty-two persons were employees of the respondent. The respondent denied that they were its employees. Another company intervened in the application asserting that the persons with respect to whom the application had been brought were employed by it and admitting they were “employees” within the meaning of the Act. Subsequently, the respondent *Ontario Hydro* objected to the matter proceeding any further on the basis that there was no “question” between the parties with respect to the “employee” status of any of the persons who were the subject of the application.

6. The Board in *Ontario Hydro, supra*, disposed of that objection as follows:

11. As indicated by the Board in *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500, once a collective agreement has been entered into, a subsequent dispute as to whether or not a particular person is included in the bargaining unit often involved two questions: (1) whether the person is an “employee”; and (2) whether the person is covered by the collective agreement itself, having regard to the language of the “scope” clause of that agreement and any factors relevant to its interpretation. (See also *Rio Algom Mines Limited*, [1975] OLRB Rep. Jan. 46, and *Douglas Aircraft of Canada Limited*, [1972] OLRB Rep. Nov. 942.) Under section 95(2) the Board determines only the first question. The second question is a matter for determination by the arbitration procedures specified in the collective agreement, in section 37a of the Act or in section 112a of the Act (if applicable), not by a section 95(2) application. As noted by the Board in *Nelson Crushed Stone*, the first question “usually involves an assessment of whether the person in question ‘exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations’”. However, in some cases, it involves the more fundamental issue of whether any employment relationship whatsoever exists between the person in question and the employer which is a party to the collective agreement (i.e., “whether a person is an employee, within the general meaning of that term, of a particular employer”: see *Hydro-Electric Power Commission of Ontario* (1971), 23 L.A.C. 111, at 112 (Weatherill). The Board has held in several cases that it had jurisdiction to determine that fundamental issue under section 95(2).

12. In *Central Supermarkets Limited*, [1967] OLRB Rep. June 299, the Board was presented with an argument similar to that submitted to the Board in the instant case by the respondent and the intervener, namely, that “while there was no agreement as to the identity of the employer the respondent agreed that the persons in question were *employees* for the purposes of the Act and, therefore, no question could arise within the meaning of section [95(2)].” In rejecting that argument, the Board stated:

“5. The Board is of the view that it is empowered not only to decide whether a person is an employee but whether or not the person is an employee of the employer who is a party to the collective agreement referred to in section [95(2)] of the Act. It is not the Board’s function to determine the question of the employment status of a person in space, because such determination would be impossible. The employment status of a person can only be determined with relation to a specific employer. The admission by the respondent that the persons in question are employees for the purpose of the Act is a meaningless admission unless the identity of the employer is also agreed to.

6. This issue has been previously dealt with by the Board in the *Loblaw Groceries*

Co. Limited case, Board File 9845-64-M, in its decision of March 2nd, 1965, wherein the Board stated as follows:

As a preliminary objection to the Board's jurisdiction to entertain this application, counsel for the intervener argues that the issue raised by the applicant is outside the subject-matter of inquiry authorized by section [95(2)] of the Act. He maintains that the inquiry authorized by this section is restricted to the issue of whether a person's particular kind of employment qualifies him as an employee for purposes of the Act. In other words, whether, for example, a person is or is not employed in a managerial capacity or in a confidential capacity in matters relating to labour relations or in any other capacity which, by virtue of section 1(3)(a) or (b) or section 2, disqualifies him as an employee within the meaning of the Act. It is his argument that, apart from any other section, if any, which might be available to the applicant for the determination of the issue raised in this application, section [95(2)] does not empower the Board, at least where the employment status of the person concerned is admittedly in the sense above indicated that of an employee for purposes of the Act, to inquire into and decide whether such a person is an employee of a particular employer. He contends that the section does not confer any jurisdiction upon this Board to adjudicate upon the real question being raised, which, as he argues, is not whether a person is *an employee* as stated in the section but whether a person, here the respondent company, is an employer. Counsel on behalf of the respondent Loblaw's supports the intervener's position that the section is not applicable to the issues being raised in this case.

The manifest object and purpose of section [95(2)] is to provide the parties, while they are bargaining for, or during the operation of a collective agreement between them, with an effective and expeditious procedure by which they can obtain a final and conclusive adjudication, binding on all interested persons, of any differences likely to arise between them concerning the question as to whether a person is an employee or a guard. It is self-evident that a very important and obvious question which may arise in such circumstances is, of course, whether a person is an employee of the employer concerned in the bargaining or in the collective agreement or whether such person is an employee of an employer who is not concerned in the matter.

It need hardly be stated that the existence of an employment relationship with the employer for whose employees a union has bargaining rights is basic to any obligation on the part of the employer to bargain under section [14] of the Act. It is equally obvious that unless employees have an employment relationship with the employer who is party to a collective agreement, they cannot, by virtue of section [42] of the Act, be bound by such an agreement. A dispute which involves the question as to whether an employment relationship exists between an employee and the employer concerned or with another employer who is a stranger to the bargaining or collective agreement may well, if it continues unresolved, leave the parties in a difficult stalemate, involving consequences detrimental to good industrial relations. Apart from any other consideration, therefore, we find it difficult to believe that the Legislature was unmindful of this kind of problem arising between the parties when it enacted the section.

• • •

It cannot be doubted that the first and indispensable prerequisite of an 'employee' for purposes of the Act is an employment relationship with the 'employer' sought to be affected by the particular provision of the Act under consideration. Moreover, no consideration of the meaning of the word 'employee' in section [95(2)] can be meaningful without reference to the other sections of the Act where the word is clearly used in the sense of indicating

the existence of an employment relationship as well as denoting the kind of employment relationship needed to qualify the person as an employee for purposes of the Act (see e.g. section 1(2), 5, 6, 7, 8 and 9). We are, therefore, at a loss to appreciate how the question of whether a person is an employee for purposes of the Act can properly be considered apart from his employment relationship with a particular employer. Employees as such do not exist in space but only by virtue of an employment relationship with their employer.

In our view, it is more consistent with the language of the section and with the sense in which the word 'employee' is used throughout the Act and with the remedial procedure sought to be afforded by the section, to construe the words *whether a person is an employee* in section [95(2)] as conferring plenary jurisdiction on this Board to inquire into all questions relating to the status of a person as an employee for purposes of the Act including the identity of the employer with whom the person has the employment relationship than to adopt the restrictive, and we think, narrow-gauged [sic] interpretation advocated by the intervener and the respondent Loblaws.

In the result, we are impelled to find that the present application and the issues raised therein come within the subject-matter of inquiry authorized by section [95(2)].

7. While the Board is of opinion that it has jurisdiction to entertain an application under section [95(2)] in the instant case, its determination of whether or not the persons in question are employees of the respondent for the purpose of the Act does not include a determination of whether or not the persons are employees of the respondent falling within the bargaining unit described in the collective agreement binding upon the applicant and the respondent. We are of opinion that the question of whether or not such persons are employed within the geographic area of the collective agreement is a matter to be determined by a board of arbitration, constituted pursuant to the provisions of the collective agreement."

Similarly, in the more recent case of *Sunnybrook Hospital*, Board File No. 0874-77-M, dated April 24, 1978, unreported, the Board held that it is within its jurisdiction under section 95(2) of the Act to determine whether certain persons are employees of the respondent employer. That decision reads in part as follows:

"1. This is an application under Section [106(2)] of the Act. In its letter of September 23, 1977 the applicant characterized the issue as 'whether S.H.U.T.C. secretaries are in fact employees of Sunnybrook Hospital or some other organization.'

2. In a decision dated September 30, 1977 the Board ruled that 'the issue raised by the instant application is one which falls to be determined upon an application of the recognition clause in the subsisting collective agreement between the applicant and respondent and accordingly, it is a matter which must be referred to arbitration under the grievance and arbitration provisions of the subsisting collective agreement.' The applicant by letter dated October 20, 1977 requested reconsideration of the Board's decision under section [106(1)] of the Act. In a decision dated January 24, 1978 the Board advised the parties that the matter would be put on for hearing in order to allow all interested parties to make representations.

3. The Board has considered the representations of the parties and is satisfied that its initial decision in this matter was in error. The question as to whether the persons who have been challenged are employees of the respondent, is within the Board's jurisdiction to determine, under section [106(2)] of the Act. (See *re Loblaws Groceries* case, 66 CLLC para. 16,078, *Central Supermarkets*, [1967] OLRB Rep. June 299.) The Board said in the latter case that:

'... it is empowered not only to decide whether a person is an employee but whether or not the person is an employee of the employer who is a party to

the collective agreement referred to in section 79(2) (now [106(2)] of the Act...”

Accordingly, the Board appointed a Board Officer in the *Sunnybrook* case to “inquire into whether the [persons in question] are employees of [the respondent] and to report to the Board.” (See also *Nick’s Haulage Limited*, [1970] OLRB Rep. Nov. 871 and 873.)

• • •

14. The respondent does not dispute that most, if not all of the persons named in this application, other than those who perform clerical functions, are covered by the aforementioned Collective Agreement between the parties if they are employees of the respondent. Thus, the issue in dispute clearly goes beyond the interpretation of their Collective Agreement to the more fundamental issue of whether any employment relationship whatsoever exists between the persons in question and the respondent; indeed, that fundamental issue is not dependent upon the existence of a collective agreement at all. Accordingly, there is nothing which makes arbitration the particularly appropriate forum for resolving that issue. The Board’s determination of the employment status of the persons in question will serve a useful purpose of the applicant and the respondent, in that it will resolve most, if not all of the matters in dispute between them. Moreover, if they are unable to resolve any remaining dispute as to whether one or more of those persons is covered by the Collective Agreement in force between them, the Board’s section [106(2)] finding may be a relevant fact for consideration in arbitral proceedings initiated to resolve such dispute (see *Re Canadian Industries Ltd.*, [1972] 3 O.R. 63 (C.A.), but see also *Re General Concrete of Canada Limited* [1978], 22 O.R. (2d) 65 (Div. Ct.)). Counsel advised the Board that arrangements have already been made with the Labour Relations Officer with respect to a number of dates for the continuation of his inquiry, which dates will be used in the event that the Board rules that he has jurisdiction to proceed. The existence of those scheduled dates is a further factor which makes it desirable for this application to proceed, as it is important from a labour relations perspective that the employment status of the person in question be determined as expeditiously as possible.

15. It was not suggested by any of the parties that the issue of whether or not the persons in question are employed by the respondent was settled by the current Collective Agreement or by any other form of agreement between the applicant and the respondent, nor was it suggested that the applicant had in any way acquiesced in the position taken by the respondent on March 11, 1981 that the persons in question are not its employees. Thus, the Board is satisfied that this is an appropriate case in which to revise the terms of the Board Officer’s appointment to more accurately reflect the issue in dispute between the applicant and the respondent.

16. For the foregoing reasons, the aforementioned endorsement of May 25, 1981 in this matter is hereby revised to read as follows:

“The Board appoints Mr. J. Bowman, Labour Relations Officer, to inquire into and report to the Board on whether the individuals named in the application are employees of the respondent.”

7. Section 106(2) of the *Labour Relations Act* has been interpreted by the Board as requiring that there be one or more “persons” with respect to whom a question of “employee” (or “guard”) status has arisen between parties to a collective bargaining relationship. Accordingly, the Board has repeatedly said that it determines the “employee” status under the Act of specifically named “persons”, not of “positions” (see, for example, *Royal Mattress Limited*, [1987] OLRB Rep. Dec. 1605).

8. Further, as the passage from *Ontario Hydro, supra*, cited above illustrates, an application to the Board under section 106(2) of the *Labour Relations Act* is not a substitute for arbitration. The Board determines whether the person with respect to whom such an application is made is an “employee” (or “guard”) within the meaning of the Act, not whether s/he is an “employee” in a bargaining unit with respect to which a trade union holds bargaining rights. Although for prac-

tical purposes a determination of “employee” status may well some way toward resolving an issue with respect to whether a person is in a bargaining unit, the two issues are not necessarily congruent. A determination that a person is or is not an “employee” does not necessarily mean that s/he is or is not an employee in a bargaining unit. That latter question is normally one for a board of arbitration to determine (see also, *Re Miller et al and Algoma Steelworkers Credit Union Ltd., et al.* (1974) 6 O.R. (2d) 676 (Ont. Div. Ct.); *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500; *Northern Telecom*, [1983] OLRB Rep. Jan. 95; *The Windsor Star*, [1988] OLRB Rep. Apr. 427).

9. In this case, the relief requested by the applicant does not include a request for a declaration that any person is or is not an “employee” within the meaning of the *Labour Relations Act*. Also, the application is with respect to a group of nurses as a class, not as individual. On the other hand, what the applicant requests is the sort of relief one would expect to see requested in an application under section 1(4) or a complaint under section 89 of the Act, or in a grievance.

10. The present application raises a number of questions, including (but undoubtedly not limited to):

- (a) Is it as a general matter appropriate for the Board to continue “who is the employer” questions in applications under section 106(2) of the Act?
- (b) Is it appropriate for the Board to do so in this case?
- (c) Can the Board grant the relief requested, or any of it, in this application, either as presently framed or at all?
- (d) What is the effect, if any, of the award of the Board of Arbitration referred to in paragraph 21 of the applicant’s schedule C?
- (e) How, if at all, should this application proceed?

11. The applicant has suggested that a Vice-Chair of the Board should be appointed to convene a pre-hearing conference to address issues regarding notice, and of evidentiary and procedural matters. It may be that a pre-hearing conference may be an appropriate part of the process if this matter proceeds. At this point, however, the Board finds it appropriate to direct the Registrar to schedule this matter for hearing. Notice of the application and of the hearing is to be given to all parties named by the applicant as respondents or interested parties. The purpose of the hearing is to hear the representations of the parties with respect to whether or not, and if so how, this application should proceed.

2591-89-R Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. Carpino Carpentry Ltd., Respondent

Certification - Construction Industry - Dependent Contractor - Employee - Whether certain finish carpenters "dependent contractors" and therefore "employees" for purposes of the Act - Board holding that carpenters in position of economic dependence on respondent such that relationship between them more like employee/employer than client/independent contractor - Carpenters found to be "employees" for purposes of the Act - Certificate issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *R. W. Pirrie* and *D. A. Patterson*.

APPEARANCES: *Michael A. Church* and *Joseph Almeida* for the applicant; *Sante Cannarozzi* and *Dominic Commisso* for the applicant.

DECISION OF THE BOARD; March 7, 1991

1. The applicant is a trade union within the meaning of 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 10, 1980, that designated employee bargaining agency is The United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

2. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* which has been made pursuant to section 144(1).

3. On the basis of the material before the Board, and pursuant to section 144(1) of the Act, the Board was satisfied (and ruled, orally, at the hearing on March 4, 1991) that all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The only real issue between the parties herein was whether there were any employees in the bargaining unit at the time the application was made. The applicant asserts there were two, Manuel Fernandes and Tony Fernandes. The respondent claims that these two persons were, at all material times, independent contractors, not "employees" within the meaning of the *Labour Relations Act*. The respondent asserts it had no employees at the time the application was made.

5. The Board (differently constituted) found it appropriate to authorize a Labour Relations Officer to inquire into and report to it with respect to this question. Pursuant thereto a Board Officer convened a meeting of the parties. The Officer examined Manuel Fernandes and both parties were also given the opportunity to examine him (which both did), and to call witnesses of their own (which neither did). The parties agreed that the evidence of Manuel Fernandes should be treated by the Board as being representative of the duties and responsibilities of Tony Fernandes and as representative of the relationship between the two men and the respondent.

6. A copy of the Officer's Report to the Board, which includes a transcript of the testimony of Manuel Fernandes, was provided to the parties for their review and comments. Neither party made written representations but the applicant requested a hearing, which hearing was held on March 4, 1991.

7. Upon considering the evidence before the Board, and representations of the parties at the hearing, the Board ruled, orally, that Manuel and Tony Fernandes are both "employees" within the meaning of the Act for purposes of this application.

8. The evidence reveals that Manuel and Tony Fernandes, (together with a third individual who was not material to this application) are equal partners in a registered partnership they have named Valdevez Carpentry. Both are finish carpenters. Together with their third partner, they usually work as a team doing trim carpentry in the residential housing sector. According to Manuel Fernandes, they approached Sante Cannarozzi, a principal of the respondent, at a job site and asked him for work sometime during the summer of 1989. Although Manuel Fernandes seemed to indicate that by the fall of 1989 he and his partners were spending approximately seventy-five per cent of their time working for the respondent and twenty-five per cent working for a company referred to as Nicetrim, there is little evidence which suggests that they worked for Nicetrim on more than an occasional basis in the fall and winter of 1990-91.

9. The three partners jointly own a van with the name and telephone number of the partnership on it. The partners maintain this van themselves. The partners also own their own carpentry tools. The expenses associated with their van and tools are treated by them as deductions for income tax purposes.

10. With respect to the work performed for the respondent, the partners are paid by the house. The rate therefor, which is the "going rate" for such work, is fixed in advance between them and the respondent and varies according to the size of the house. The respondent directs them to the houses they are to work on and, other than nails, the respondent provides all the necessary materials. The partners issue an invoice for work they have completed at the end of each month. This invoice is paid in full by the respondent without any deductions or income tax, unemployment insurance, Canada pension plan, or other standard employment deductions, and, significantly, without any holdback under the *Construction Lien Act*. The partners receive no employment-type benefits from the respondent and carry their own Workers' Compensation coverage. Their work is not closely supervised and they work hours of their own choosing.

11. Section 1(1)(i) of the *Labour Relations Act* provides that "dependent contractors" are "employees" for purposes of the Act. Section 1(1)(h) defines "dependent contractor" as follows:

...

- (h) "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

...

12. The purpose and history of the "dependent contractor" provision has been well summarized in previous Board decisions (see, for example, *Atway Transport Inc.*, [1989] OLRB Rep. June 590, at paragraphs 44 and 45). We find it unnecessary to review that history in this case. As

the Board's jurisprudence demonstrates, it can be quite difficult to distinguish between "dependent" and "independent" contractors. This is particularly true in the construction industry which, in Ontario, is very craft or trade oriented. It is essential that an assessment of whether an individual is a dependent or an independent contractor be made having regard to the context of the craft or trade in the sector of the construction industry in which the individual is engaged.

13. There have been many previous cases before the Board in which it has been alleged that persons who considered themselves to be self-employed were "independent contractors". In circumstances where such persons were essentially "labour only" subcontractors paid on a piece work basis to install someone else's materials on someone else's job site(s), they have been found to be dependent contractors (see, for example, *Mr. Seamless Eavestroughing Thunder Bay Limited*, [1974] OLRB Rep. Dec. 875, *Mo-Mek Systems Ltd.*, [1974] OLRB Rep. Oct. 642, *Toronto Dry-wall Services*, [1976] OLRB Rep. Oct. 645, *Ofira Construction*, (Board File No. 1051-81-R, July 19, 1982, unreported), *Supreme Carpentry Inc.*, [1989] OLRB Rep. Nov. 1181, *GM Finishing Inc.*, (Board File No. 1611-89-R, February 28, 1990, unreported) among others). In that respect, the circumstances before the Board in *Supreme Carpentry Inc.* and *GM Finishing Inc.*, *supra*, were very much like those of Manuel and Tony Fernandes in this case.

14. The tools owned by Manuel and Tony Fernandes are the tools of their trade in the residential sector of the construction industry. Vehicles, such as the van which they own are also typical. Nor is the fact that they provide their own nails significant. It is not uncommon for employees working at a piecework rate in residential construction to provide some consumable materials at their own cost. In effect, Manuel and Tony Fernandes were doing no more than supplying their labour, through their partnership, to the respondent, as a fixed price per unit. Supplying labour is what employees do.

15. Although the partners engage in work as it is available and are not restricted to working for the respondent alone, this sort of mobility is common in residential construction. Nor do they advertise or otherwise seek business as such. In addition, the evidence reveals that Manuel and Tony Fernandes spent a substantial portion of their time working for the respondent at the material times. There was little real bargaining between Manuel and Tony Fernandes and the respondent. In effect, they receive the "going rate" of remuneration and work under conditions typical of construction in the residential sector.

16. Because they are paid on a piece work basis Manuel and Tony Fernandes' working hours are very much driven by the economic relationship. The fact that they are paid at the end of each month for the houses they have completed also suggests a dependency relationship. The fact that they deduct certain expenses for income tax purposes does not, by itself, indicate they are independent contractors. On the evidence before the Board, such expenses could as easily be legitimate employment expenses as they could be business expenses. It is not surprising that Manuel and Tony Fernandes receive little supervision from the respondent. Being skilled workers, they require no real supervision in a traditional sense. The manner in which Manuel and Tony Fernandes obtain work suggests that they are pursuing employment rather than business opportunities. Finally, there is no real opportunity for Manuel and Tony Fernandes to make a profit in a business sense and no real risk of loss for them in their relationship with the respondent.

17. On the basis of the evidence, and whatever they might be for income tax or other purposes, the Board was satisfied that Manuel and Tony Fernandes were in a position of economic dependence on the respondent such that the relationship between them was more like that of employee and employer than of client independent contractor at the material times.

18. The Board therefore ruled, orally at the hearing, that Manuel and Tony Fernandes are

dependent contractors within the meaning of the *Labour Relations Act* and therefore employees for the purposes of this application. There was no dispute that they were performing bargaining unit work at the material times and the Board was therefore satisfied that they were employees in the bargaining unit for purposes of this application.

19. The Board was also satisfied, on the basis of the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 6, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

20. Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliate bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 1 above in respect of all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

21. Further, and also pursuant to section 144(2) of the Act, a certificate will issue to the applicant in respect of all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman.

2446-90-R; 2483-90-R Labourers' International Union of North America, Local 1081, Applicant v. **Freure Construction Limited**, Respondent v. Group of Employees, Objectors; United Brotherhood of Carpenters and Joiners of America, Local 785, Applicant v. **Freure Construction Limited**, Respondent v. Labourers' International Union of North America, Local 1081, Intervener v. Group of Employees, Objectors

Bargaining Unit - Certification - Construction Industry - Unions applying for certification under section 144(1) of the Act - Bargaining unit proposed by Labourers described to include all other employees in Board's geographic area #8 - Unit proposed by Carpenters described to include all other employees in area #22 - Employer employing no labourers in area #8 and no carpenters in area #22 on application date - All employees affected by applications working in Board area #6 on application date - Board finding geographic area in which no employees working (in trade for which application sought) not an "appropriate geographic area" as the term is used in section 144(1) of the Act

BEFORE: N. B. Satterfield, Vice-Chair, and Board Members D. A. MacDonald and H. Kobryn.

APPEARANCES: Bernard Fishbein, Paul Trudelle and Jo Braun for Labourers' International

Union of North America, Local 1081; *Dave Watson* and *Karl Ball* for United Brotherhood of Carpenters and Joiners of America, Local 785; *Bruce Binning* and *David Freure* for the respondent.

DECISION OF THE BOARD; March 8, 1991

1. These are two applications for certification made under the construction industry provisions of the *Labour Relations Act*. Each application raised an issue respecting the description of the unit of employees of the respondent which would be appropriate for collective bargaining. The parties agree that, for purposes of hearing and deciding that issue, the name of the respondent in the style of cause should be amended to: "Freure Construction Limited". That agreement is without prejudice to either applicant raising at a later date an issue of whether there are other "Freure" companies which should be made parties to the applications. The parties agree also, and the Board finds, that each application is made under subsection 144(1) of the Act which provides as follows:

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

A successful application under subsection 144(1) of the Act results in two certificates being issued pursuant to subsection 144(2) which states:

144.-(2) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade unions on whose behalf the application is brought, or, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade unions on whose behalf the application is brought, the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

2. The specific issue in these applications relates to the requirement of subsection 144(1) that the unit of employees shall include, in addition to those employees who would be bound by a provincial agreement, "... all other employees in at least one appropriate geographic area ...". The unit of employees proposed by the applicant Labourers' International Union of North America, Local 1081 (hereafter "the Labourers' union") is described to include all other employees in the Board's geographic area #8. The unit of employees proposed by the applicant United Brotherhood of Carpenters and Joiners of America, Local 785 (hereafter "the Carpenters union") is described to include all other employees in the Board's geographic area #22. For purposes of deciding the legal issue argued by the parties, it is not disputed that the respondent employed no construction labourers in Board area #8 and no carpenters in Board area #22 on the dates of making of these applications; nor is it disputed that all of the employees who might be affected by these applications were working in Board area #6 on the date of making of the application.

3. The parties agreed to admit as evidence, subject to argument on its probative value, a report dated April 11, 1980 prepared for the Minister of Labour by George W. Adams, special

counsel (at that time). The report is titled "Concerning Representations by the Toronto - Central Ontario Building and Construction Trades Council on Bill 204, an Act to Amend *The Labour Relations Act*".

4. The Board does not propose to set out the able argument of counsel. It has reviewed and weighed them carefully and will simply summarize the main thrust of the arguments.

5. Counsel for the applicants argue that the Board's "rules" respecting what constitutes units of employees appropriate for collective bargaining in the construction industry changed with the introduction of section 144 of the Act in 1980. They argue that the new rules are expressed in the Board's jurisprudence dealing with applications for certification made under section 144 of the Act, and more particularly under subsection 144(1), from which five principles can be extracted. Counsel argue that the bargaining units proposed in their applications are consistent with those principles and with the requirements of subsection 144(1) that a bargaining unit include, in addition to those employees who would be bound by a provincial agreement, "... all other employees in at least one geographic area ...". The five principles identified by counsel and the main authorities which counsel cited are as follows:

- (1) Section 144 of the Act is exhaustive for all bargaining units in applications for certification made under the construction industry provisions of the Act; or, more particularly, in an application for certification, no unit of employees which would be appropriate under subsection 6(1) of the Act can exist outside of section 144 and section 144 prevails over subsection 6(1). *Clarence H. Graham Construction Limited*, [1981] OLRB Rep. Sept. 1195.
- (2) Whether an application pertains to the industrial, commercial and institutional (hereafter "the ICI") sector and is made under subsection 144(1), or does not, and is made under subsection 144(3) is for the affiliated bargaining agent making the application to decide. *Graham Construction, supra*, at paragraph 7 and *Pelar Construction Ltd.*, [1981] OLRB Rep. Feb. 210, at paragraph 14.
- (3) It is not necessary that any employees be working in the ICI sector when an affiliated bargaining agent chooses to apply under subsection 144(1) for certification for a unit of an employer's employees. *Colonist Homes Ltd.*, [1980] OLRB Rep. 1729. In other words, an affiliated bargaining agent can obtain bargaining rights under section 144 even though there are no employees working in the ICI sector when the application was made.
- (4) Conversely, it is not necessary for there to be any employees working in a sector other than ICI, when an application is made under subsection 144(1) by an affiliated bargaining agent, in order to obtain bargaining rights in all other sectors. *Watcon Inc.*, [1981] OLRB Rep. Nov. 1697.
- (5) When an affiliated bargaining agent applies for certification under subsection 144(1), if the employer has employees working in more than one geographic area prescribed by the Board under subsection 119(1) of the Act, the affiliated bargaining agent chooses which area or areas by which the "all other employees" part of its unit is to be

described and it does not have to take all of the areas. *Dagmar Construction Limited*, [1987] OLRB Rep. April 480; *Louis W. Bray Construction Limited*, Board File No. 1729-86-R, unreported decision dated October 24, 1986; *Beling Cement Construction Limited*, [1989] OLRB Rep. July 709; and *Beaverbrook Estates Inc.*, [1989] OLRB Rep. April 322.

6. Counsel for the applicants argue that, based on those principles, an affiliated bargaining agent is entitled to make an application under subsection 144(1), whether or not any of the employees for whom it is seeking bargaining rights are employed in the ICI sector at the time, by describing the unit to include such employees. *Colonist Homes*, *supra*. If its application succeeds, subsection 144(2) mandates the Board to issue two certificates, one restricted to the ICI sector of the construction industry in the Province of Ontario and the other for all other sectors in the geographic area found by the Board to be appropriate. Counsel describe this process as one which entitles a successful applicant to a “free” certificate insofar as there might be employees in the ICI sector and none in any other sector, or vice versa, at the making of the application. According to counsel’s “free certificate” thesis, the free certificate in the first circumstance would be for all other sectors in an appropriate geographic area, while it would be the ICI sector in the second circumstance. That is all the applicants are doing herein, it is argued. The construction labourers and the carpenters employed in Board area #6 whom the applicants are seeking to represent are employed in the ICI sector and would be covered by the province-wide ICI certificate issued pursuant to subsection 144(2) of the Act. The second certificate that is, the one for all sectors other than the ICI sector, which they are seeking is for Board areas #8 (construction labourers) and #22 (carpenters) where there are no employees in any sector.

7. There is nothing unusual in that, counsel argue. Each of those areas is one of the 32 geographic areas which the Board has developed for the purpose of subsection 119(1) of the Act which requires the Board to determine “... the unit of employees that is appropriate for collective bargaining by reference to a geographic area ...” instead of confining the unit to a particular project. See *Klimack Construction Limited*, [1986] OLRB Rep. Sept. 1238, at 1239. Thus those 32 geographic areas are ones which the Board has already found to be appropriate. Counsel submit that there would be no prejudice created by the fact that the applicants would get bargaining rights in areas where there were no employees at the time the applications were made and would forego bargaining rights for any employees who might have been working in Board area #6 in sectors other than the ICI sector.

8. As the Board understands their arguments, the Board should not be concerned with the fact that there are no employees in the Board area for which each applicant is seeking bargaining rights for “all other sectors” in circumstances where they are not seeking bargaining rights for any employees who might have been working in sectors other than the ICI sector in Board area #6 when these applications were made. According to counsel, the fact that the applicants are willing to forego bargaining rights for employees in Board area #6 in sectors other than the ICI sector in favour of getting bargaining rights in another geographic area where there were no employees at work in any sector, simply takes one step further that which the Board has accepted already in *Colonist Homes* and *Dagmar*, *supra*. That is, a successful application for certification under subsection 144(1) of the Act can result in the applicant getting bargaining rights in the ICI sector where none of the employees at work when the application was made were in that sector (*Colonist Homes*) or getting bargaining rights in all other sectors where none of the employees at work when the application was made were in any other sector (*Dagmar*).

9. Counsel for the applicants acknowledge that the Board’s decision in *E/E Fradema*

Masonry, [1986] OLRB Rep. Dec. 1685 might be read to run counter to their argument. It was a decision made absent submissions from the parties on the applicant's request in an application brought under subsection 144(1) of the Act for a unit of employees in the ICI sector in the Province of Ontario and in all other sectors in two of the Board's geographic areas, #15 and #31. The Board ascertained that there were no employees at work in Board area #31 when the application was made and, therefore, it was not prepared to describe the geographic scope of the "all other sectors" part of a unit which would satisfy the unit mandated by subsection 144(1) so as to include Board area #31. In so doing, the Board stated at paragraph 7, "... In our opinion, an appropriate geographic area means, at the very least, an area in which employees were employed as of the application date. It seems to us that a geographic area in which no employees were employed as of the application date is not an appropriate geographic area ...". Counsel for the applicants argue that the application was decided without the argument which has been made in the instant applications and, in any event, the decision is consistent with the Board's jurisprudence on which they rely. All *Fradema* says, they submit, is that, where employees were working in one Board area only, a successful applicant under subsection 144(1) cannot get more than one certificate for the ICI sector in the Province of Ontario and another for all other sectors in one Board area. Unlike the applicant in *Fradema Masonry*, all that each applicant herein is seeking to do is get its province-wide certificate for the ICI sector in which the employees affected by the application were working and another certificate for a Board geographic area where there were no employees. Counsel submit that the applicants are not making a grab for bargaining rights to which they are not entitled because subsections 144(1) and (2) work together to give a successful applicant bargaining rights province-wide in the ICI sector and in all other sectors in at least one appropriate geographic area and that is all that the applicants would get here if their applications are successful.

10. Counsel for the respondent argues that the applicants are improperly attempting to circumvent the requirements and purpose of subsection 144(1) of the Act because where, as here, there were other employees at work in Board area #6 in the ICI sector and another sector when the applications were made, they are for all practical purposes applications for bargaining rights in the ICI sector only. The Board digresses here to observe that, while there was no specific agreement that the respondent was the employer of the employees in the ICI and another sector, it may be assumed that it was for the purpose of the legal issue argued before the Board. Respondent counsel's argument continues as follows. The intent of section 144, and subsection (1) in particular, was to preserve as much as possible the practice which existed prior to the province-wide extension of ICI sector bargaining rights in 1980. That practice was to describe bargaining units without reference to sector and pursuant to subsection 119(1) of the Act, by reference to a geographic area and not a project. By defining units without reference to sector, when a trade union was certified, it got bargaining rights for all sectors of the construction industry, but in a single Board geographic area. The only difference after section 144 was added to the Act was that, as a result of the province-wide extension of ICI sector bargaining rights, where an application for certification was made to relate to the ICI sector, the bargaining unit had to include employees in the ICI sector throughout the province, and not just in a single Board area as it was prior to the introduction of section 144. The reason why subsection 144(1) requires that applications be brought for all sectors and not just the ICI sector is to avoid the need of determining whether the employees in the local geographic area in which the application is made (in these applications that would be Board area #6) are employed in the ICI sector. All of the Board decisions referred to reflect that intent, counsel submits, and it is a logical interpretation of section 144 and the words "... at least one appropriate geographic area ..." in subsection 144(1).

11. The Board does not take issue with the principles which counsel for the applicants have extracted from the Board's jurisprudence. A similar analytical summary can be seen, as they

pointed out, at paragraph 6 of the Board's decision in *Westdale Painting & Decorating Ltd.*, [1989] OLRB Rep. Sept. 984. The Board does not agree, however, that the application of those principles to the circumstances of these applications supports the result contended by counsel.

12. Section 144 in its present form was introduced into the Act by Statutes of Ontario 1980 Chapter 31 (Bill 73) which became effective May 1, 1980. It was the companion to subsection 137(2) which was introduced into the Act by Statutes of Ontario 1979 Chapter 113 (Bill 204) which also became effective May 1, 1980. Subsection 137(2) extended bargaining rights in the ICI sector held by an affiliated bargaining agent prior to May 1, 1980 in one or more Board geographic areas to all other affiliated bargaining agents of the employee bargaining agency designated to represent those affiliated bargaining agents. Subsection 144(1) assured that all bargaining rights in the ICI sector acquired after May 1, 1980 by an affiliated bargaining agent of a designated employee bargaining agency would be acquired province-wide on behalf of the applicant affiliated bargaining agent and on behalf of all other affiliated bargaining agents of the designated employee bargaining agency. Subsections 144(1) and (2) work together to achieve this result. Subsection 144(1) mandates a single appropriate bargaining unit. Once an applicant demonstrates adequate membership support in that unit, subsection 144(2) has the somewhat curious effect of creating two bargaining units, one confined to the ICI sector and one for all other sectors in the geographic area which the Board found to be appropriate. The Board described this process in the following terms in *Westdale Painting, supra*, at paragraph 6:

... Applications, like this one, under section 144(1), of the Act can only be brought by an affiliated bargaining agent. Every such application must relate to a bargaining unit which includes '... all employees who would be bound by a *provincial* agreement [as defined in section 137(e) of the Act] *together with all other employees in at least one appropriate geographic area ...*' [emphasis added]. Consequently, an applicant trade union's right to certification is determined on the basis of the membership support it demonstrates within a single bargaining unit consisting of all ICI employees which the trade union's designated employee bargaining agency is entitled to represent in bargaining *and all* other such employees (see *Aero Block and Precast Ltd.*, [1984] OLRB Rep. Sept. 1166) in one or more appropriate geographic areas. ... It is only after the Board determines that a trade union is entitled to be certified as the bargaining agent of the employees in the single bargaining unit applied for that the Act stipulates, in section 144(2), that the Board issue two certificates, one confined to the ICI sector, and one in relation to all other sectors of the construction industry in the geographic area(s) concerned. In the result, a trade union's right to be certified under section 144(1) is determined on the basis of its support in *one* bargaining unit, but if it is successful it receives *two* certificates; that is, certificates for two bargaining units (see *Fred Jantz Masonry Construction Company Limited*, [1986] OLRB Rep. Aug. 1083).

[emphasis in original]

13. The certificate confined to the ICI sector is issued to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency with respect to employees in the ICI sector of the construction industry in the Province of Ontario. The other certificate is issued to the applicant for itself for sectors other than the ICI sector in the appropriate geographic area. See *Pelar Construction, supra*, at paragraph 19.

14. The Board herein finds it unnecessary to analyze further the history of section 144, that has already been done in *Colonist Homes* and *Pelar Construction, supra*. It is clear from the analysis in those cases that section 144 in its present form was intended to make bargaining rights in the ICI sector available to affiliated bargaining agents only on a province-wide basis and in a manner which would minimize the need for the Board to determine whether there are employees working in that sector, a need which did not arise when, prior to subsection 144(1), the Board certified trade unions without reference to sectors and confined a certificate to a single Board area. See

Lyle West Electric Limited, [1978] OLRB Rep. Nov. 999. In that regard, the Board in *Pelar Construction* expressed the view at paragraph 16 that "... the legislative history of [subsection 144(1)] evinces a clear legislative intent to avoid making determinations concerning sectors in the context of certification proceedings ...". At paragraph 17 the Board expressed the further view that "... there are good labour relations reasons for avoiding such sectorial determinations in the context of certification proceedings.", and that "... the concern expressed of the Board in the *Lyle West* case about the delay caused by such determinations is still a very real concern.". In other words, delay from that cause is still a matter for concern in applications for certification made under what is now section 144 of the Act.

15. In the view of this panel of the Board, that objective has been pursued by preserving as much of the practice which existed prior to May 1, 1980 as is consistent with a reasonable construction of section 144, and subsection 144(1) in particular. That would appear to be what led the Board in *Pelar Construction*, *supra*, at paragraph 16 to interpret (correctly in this Board panel's view) the words of subsection 144(1) that "... the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area ..." to mean that "..., for the local area in which the application is made ... the unit of employees *must* include all employees in all sectors." (emphasis in the original). The Board concluded "[t]hus, in determining the list of employees it is not necessary, in the local geographic area, to have regard to the sector in which such employees are working.".

16. In these applications the local area in which the applications are made is Board area #6, not Board areas #8 and #22. If the Board accepts the meaning counsel for the applicants contend for the words "... in at least one appropriate geographic area ...", in these applications and every application where an applicant proposes as the "appropriate geographic area" one where there are no employees at work in any sector of the construction industry, there would be a potential requirement to determine whether the employees who are affected by the application are working in the ICI sector. For example, in these applications it is agreed that there were some employees at work in the ICI sector in Board area #6. To the extent that there were also other employees at work in that Board area on the application date, there is potential for a dispute over whether they were at work in the ICI sector. If a dispute should materialize, the Board would be unable to determine the applications until it made a sector determination resolving the dispute. This alone is reason enough for the Board not to interpret the phrase as argued by counsel for the applicants and, instead, to give it the same meaning as the Board in *Fradema Masonry*, *supra*, when it said that "... an appropriate geographic area must mean, at the very least, an area in which employees were employed on the application date.". It was for the same reason that this panel of the Board agreed above with the observation in *Pelar Construction*, *supra*, that "..., for the local area in which the application is made, ... the employees *must* include all employees in all sectors." (emphasis in the original). While the Board in that case was interpreting subsection 144(1) for purposes of deciding a different legal issue, the observation is equally relevant to the issue in these applications.

17. Notwithstanding the applicants' innovative argument, the Board is not satisfied that there is any cogent reason to depart from the interpretation of subsection 144(1) which is well-established in the Board's jurisprudence. On the contrary there are sound labour relations reasons not to do so, particularly the avoidance of delay in determining applications for certification. It also avoids some potentially incongruous results. For example, assume in these applications that the employer had four employees working in the residential sector of Board area #6 and no employees working elsewhere in the province. If the Board accepted the applicants' interpretation of subsection 144(1) and the applications were successful, the applicants would get the "free" certificates (by the applicants' definition) for the ICI sector in the Province of Ontario and another

“free” certificate for all other sectors in Board area #8, in the case of the labourers, and in Board area #22, in the case of the carpenters. The Board therefore finds that a geographic area in which there were no employees working (in the trade for which certification is sought) at the making of the application would not be an “appropriate geographic area” as that term is used in subsection 144(1) of the Act in the phrase “... all other employees in at least one appropriate geographic area ...”. Therefore, Board area #8 would not be an appropriate geographic area for the application of the Labourers’ union in File No. 2446-90-R and Board area #22 would not be an appropriate geographic area for the application of the Carpenters union in File No. 2483-90-R. Accordingly, subject to the resolution of any question of the correct name(s) of the respondent(s), the appropriate bargaining unit in each of these applications made under subsection 144(1) of the *Labour Relations Act*, is to be described as follows:

File No. 2446-90-R

all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman;

File No. 2483-90-R

all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman.

18. These applications are to be listed for hearing for the purpose of receiving the evidence and representations of the parties respecting all matters remaining in dispute.

19. This panel of the Board is not seized with these applications.

1211-90-R Independent Canadian Transit Union, Applicant v. Hopital Montfort, Respondent v. International Union of Operating Engineers, Local 796, Intervener

Certification - Representation Vote - Applicant union seeking new representation vote on ground that its name appeared on ballot in English only - Applicant union aware prior to vote that its name was to appear on ballot in English only but failing to request that name appear in English and French - Board not convinced that reasonable voter would be unable to distinguish between applicant and intervener because applicant’s name appearing in English only - Board declining to direct new vote

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *R. M. Sloan* and *R. R. Montague*.

APPEARANCES: *M. Van Dusen* and *G. Gifford* for the applicant; *S. Y. Turenne* and *R. Bordeleau* for the respondent; *J. J. Slaughter* and *C. Castonguay* for the intervener.

DECISION OF THE BOARD; March 25, 1991

1. Subsequent to a representation vote held in the matter, this application for certification was dismissed by a decision of the Board dated December 24, 1990.
2. During the course of those proceedings the applicant requested that the Board direct a new representation vote. These are the reasons for the Board's decision, orally at the hearing, to deny that request.
3. The ballot employees marked in the course of the vote was as follows:

Make an "X" in the circle opposite your choice IN YOUR EMPLOYMENT RELATIONS WITH / Inscrire un "X" à côté de votre choix POUR ASSURER LES RELATIONS DE TRAVAIL AVEC	
HÔPITAL MONTFORT	
DO YOU WISH TO BE REPRESENTED BY / DÉSIREZ-VOUS ÊTRE REPRÉSENTÉ PAR	
INDEPENDENT CANADIAN TRANSIT UNION	<input type="radio"/>
OR / OU	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 796	<input type="radio"/>

Essentially, the applicant's position was that a new vote ought to be directed since, although the ballot was otherwise bilingual, the applicant's name therein appears in English only.

4. Some background information is necessary to understand the context of the applicant's request. The following recitation either emerges directly from the Board's record or consists of facts all parties were willing to accept as true for the purposes of the intervener's motion to dismiss the applicant's request.
5. This application was filed on August 1, 1990. The application was filed in English. Membership evidence filed in support of the application was filed in English. The Form 9 filed in respect of the application was filed in English.
6. The respondent's reply, dated August 22, 1990, was filed in French and explicitly requested that all procedures as well as the members of the panel be bilingual.
7. As is the usual practice in pre-hearing vote applications, the parties, pursuant to the Board's decision of August 16, 1990, met with a Labour Relations Officer on August 28, 1990 to deal with various matters relating to the application and a written report, signed by the parties, was

prepared. In this report the applicant is listed as "Independent Canadian Transit Union". However, in Appendix E to the report which deals with the vote arrangements, the applicant is listed as "Independent Canadian Transit Union Syndicat Independent Canadian Transport". In the portion of the Appendix which deals with positions on the ballot the following appears:

Independent Canadian Transit Union

Syndicat ~~Independent~~ International Union of Operating Engineers Local 796

Further, while the Appendix indicates that ballots are to be in French and English, no explicit request is made in the Appendix (or elsewhere in the report) that the applicant's name appear on the ballot in English and French.

8. Under a covering letter dated September 14, 1990 the Registrar forwarded a copy of Form 69, Notice of Taking of Vote, to the parties. The notice indicated that the vote would be held on September 19, 1990 and included a sample ballot in the form already outlined in paragraph 3 above.

9. The applicant received and reviewed the Form 69 and the sample ballot on September 17, 1990. It decided not to raise the issue of its name appearing in English only at that time. The applicant felt that the negative effects of a possible delay of the vote (which had already been postponed by a week) which might result from having to change the form of the ballot on short notice would outweigh those of its name appearing on the ballot in English only.

10. The vote was held, as scheduled, on September 19, 1990. At the conclusion of the balloting Mr. Larabie, on behalf of the applicant signed a Certification of Conduct Of Election form which provides, *inter alia*, as follows:

We, the undersigned, acted as scrutineers for the parties herein in the conduct of the balloting at the time and place mentioned. We certify that the balloting was fairly conducted and that all eligible voters were given the opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

11. In addition, Mr. Griffin, on behalf of the applicant, signed a Consent and Waiver form which provides, *inter alia*, as follows:

WE the undersigned hereby consent to an immediate counting of the ballots cast at the representation vote directed by the Board and held on the 19th day of September, 1990.

AND WE hereby waive any objection as to the regularity and sufficiency of the balloting.

12. No objection was made at that time to the sufficiency of the ballot used in the vote. The ballots were counted: 61 ballots were marked in favour of the intervener; 59 ballots in favour of the applicant; and 8 ballots were segregated and not counted.

13. By letter dated September 21, 1990 the applicant requested a hearing and raised, for the first time with the Board, the issue of the sufficiency of the ballot used in the representation vote.

14. A number of aspects of the campaign between applicant and the intervener leading up to the vote as well as some developments subsequent to the vote are relevant to the parties' submissions and our determination.

15. A number of documents were filed with us on the consent of the parties. These consisted chiefly of propaganda pamphlets prepared by the applicant or the intervener in support of

their campaigns to win the representation vote. We pause to note that documents prepared by both unions contain the kinds of exaggerations and dubious presentation or interpretation of the *Labour Relations Act* one might expect to find in the context of a closely fought election campaign. No one suggested, and neither do we, that any of these questionable statements constitute violations of the Act. They do, however, underscore the wisdom of the Board's general policy not to act as a referee between competing parties to a representation vote.

16. In any event, it is fair to say that, among others, two issues surfaced during the propaganda war between the unions: the ability of the applicant to provide services in French and the possible delay and lack of collective agreement protection which might flow from a change in bargaining agents.

17. The applicant has also submitted that employees may have been confused about their votes since the applicant was not referred to by its French name as had been the case on much of its propaganda literature. However, the only evidence supporting this claim was in the form of a letter signed by Mr. Larabie with an accompanying petition signed by 16 employees. The intervener initially objected to the Board receiving these documents in evidence. This objection may have been well founded for many reasons including the fact that although the letter was dated October 16, 1990 and addressed to the Registrar, the applicant took no steps to file it with the Board until the hearing (i.e. approximately a month later and approximately 2 months after the vote). In any event, while maintaining its right to pursue the objection in a different context, the intervener (and the respondent) agreed to file these documents with the Board only for the purpose of the present determination.

18. Mr. Larabie's letter reads, in part, as follows:

... During the days that followed the vote, several of my fellow workers expressed their disappointment to me at not having found the name of one of the unions in French. They were expecting to read "SYNDICAT CANADIEN INDEPENDANT DES TRANSPORTS" rather than "CANADIAN INDEPENDENT TRANSIT UNION" [on the ballot].

In order to correct this situation, my colleagues have signed a petition by which they are asking that you,

1. hold another election,
2. insure that the names of the unions as well as the necessary instructions appear on the ballots in French.

[Translation]

19. The preamble to the petition attached to Mr. Larabie's letter reads as follows:

We the undersigned hereby request:

1. that the election of September 19, 1990 held by the Ontario Labour Relations Board be cancelled;
2. that the Board hold another election at Hopital Montfort;
3. that the ballots for this new election be printed in French as well [as English].

[Translation]

20. We are not persuaded that, even accepting all the facts as pleaded by the applicant, these are circumstances in which we should exercise our discretion to direct holding a new vote.

21. The jurisprudence of the Board is replete with decisions in which the Board has not allowed a party to resile from its previous agreements and, more particularly, has not allowed a party to challenge the propriety of a vote it has previously certified as proper notwithstanding its prior knowledge of the defect subsequently complained of. The seminal expression of this view is found in *Chateau Gardens (London) Inc.*, [1977] OLRB Rep. Jan. 12 at para 8 where the Board observed:

... If the circumstances described to the Board in the CLAC's evidence was true and had due diligence with respect to the wrongdoings been exercised then adjustments could have been made to correct the alleged shortcoming. In other words, it does not lie in the mouth of a party to exploit to its own advantage a rule that was designed to assure fairness in the conduct of the vote. We find that a party cannot "lie in the bushes" and await the outcome of a vote and when it learns that the result was not amenable to its liking seek a second representation vote on the basis of a breach of a rule that could have been brought to the Board's attention in advance of the taking of the vote.

22. This sentiment is echoed in numerous other Board cases including *The Salvation Army Grace Hospital, Windsor, Ontario*, [1965] OLRB Rep. Nov. 539; *Lecours Lumber Company Limited*, [1972] OLRB Rep. Nov. 982; *Laurentian University of Sudbury*, [1979] OLRB Rep. July 672; *Bermay Corporation Limited*, [1980] OLRB Rep. Feb. 166; *Golden Griddle Restaurant*, [1983] OLRB Rep. Oct. 1651; and *Northfield Metal Products Ltd.*, [1989] OLRB Rep. Jan. 57.

23. The applicant in the present case apparently commenced its organizing campaign in English - its application and membership evidence were entirely unilingual. During the course of the campaign the applicant became more sensitive to the issue of provision of services in French as a result (at least in part) of some of its opponent's propaganda. But while most of its campaign literature was prepared in a bilingual form, the applicant made no explicit request of the Board at any time prior to the vote that its name appear in both languages on the ballot. Further, once the applicant was provided with a copy of the sample ballot it failed to take any of the opportunities available to it either before or at the vote, to raise its concern with the Board. It was only after the results of the vote were known that the applicant first chose to raise the issue with the Board.

24. The applicant agreed that it should not be permitted to "lie in the bushes" in the fashion described in *Chateau Gardens* case *supra*. It denies that this is what it has done. It argues that faced with what it viewed as the choice between possibly delaying the vote and not challenging the sufficiency of the ballot, it swallowed hard and opted for the latter. It was only after the vote that the applicant was provided with information, reflected in Mr. Larabie's letter and accompanying petition, which led it to conclude that voters may have been confused and caused it to seek a new vote.

25. In many ways this really is the heart of the matter. The applicant made a difficult and conscious political choice not to challenge the ballot despite its view, prior to the vote, of its insufficiency. Now, with the benefit of hindsight, the applicant concludes that it may have made the wrong choice and asks the Board to rectify that error on its behalf. Just as Board cases such as *Golden Griddle*, *supra*, have suggested that the finality of a vote ought not to be compromised to rescue a mistaken party from its own carelessness or inadvertence, neither should the Board be called upon to correct conscious judgements and political calculations which events may show to have been misguided.

26. It should be clear that we have not been persuaded, on the basis of the material and submissions before us, that any individual employees were actually confused about how to exercise their franchise because the applicant's name appeared on the ballot only in English. Even if such an inference were attractive it would not follow that our confidence in the integrity of the vote

would be so undermined as to cause us to order a new vote. As the Board in *Northfield Metal, supra*, observed, the test to be applied in the circumstances would not be based on the most gullible or, in our case, most confused vote, but rather the “reasonable voter who is possessed of critical faculties and the ability to assess issues and inquire on his or her own behalf”. In the circumstances of this case, we are not convinced that a reasonable voter would be unable to distinguish between the applicant and the intervener because the former’s name appeared on the ballot in English only.

27. In many ways the facts of the present case closely resemble those in *Lecours Lumber, supra*, although the impugned ballot in that case was entirely unilingual. For reasons which support and are similar to ours in the present case, the Board did not permit the respondent to object to the sufficiency of the ballot when no such objection had been raised prior to the taking of the vote and the signing of the relevant waiver forms. We cannot leave consideration of the *Lecours* case without a final important observation. Obviously, the very facts of the present case demonstrate that the Board’s statement in *Lecours* that “the consistent practice of the Board, even where all of the parties have requested that the ballots be printed in French as well as in English is to supply ballots in the English language only” has been overtaken by events. There have been significant changes in the social and legislative context in the approximately twenty years since the *Lecours* decision. Indeed, had the applicant in our case made a timely request, there is no reason to doubt that the Board would have provided the very kind of ballot now asserted to be appropriate. (Neither is it certain that a delay in holding the vote would have been required.) What has not changed, however, in the twenty years since the *Lecours* case is the Board’s aversion to allowing a party obviously unhappy with vote results to challenge the vote on the basis of alleged deficiencies known but not acted on or identified prior to disclosure of the vote results.

28. It was for all of these reasons that we ruled orally at the hearing that the Board would not direct a new vote.

0516-90-R Bonnie Sawyer and fellow employees, Applicants v. Retail Wholesale and Department Store Union, Local 414, AFL:CIO:CLC:, Respondent v. Kent Drugs Limited, Intervener

Petition - Termination - Whether petition voluntary expression of employee wishes - Petition posted on lunchroom bulletin board for one hour - Several signatures obtained on company premises during working hours - No cogent evidence concerning circumstances in which one signature obtained - One signer, although in bargaining unit, likely perceived by bargaining unit employees to be closely allied to management - Board not satisfied that petition representing voluntary expression of employee wishes - Application dismissed

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. W. Pirrie* and *K. S. Davies*.

APPEARANCES: *Paul B. Nielsen*, *Bonnie Sawyer* and *Barbara Whitfield* for the applicants; *Robert McKay*, *John Fuller* and *Primrose Short* for the respondent; *Ann E. Burke*, *Rick Ashley* and *Ted Smith* for the intervener.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER K. S. DAVIES;
March 7, 1991

1. This is an application under section 57(2) of the *Labour Relations Act* for a declaration that the respondent (also referred to in this decision as the “Union”) no longer represents the employees of the intervener (also referred to as the “Company”) in the two bargaining units described below, for which it is the bargaining agent.

2. It is common ground among the parties that this application is timely, and that the respondent is currently the bargaining agent for the following bargaining units:

Full-time bargaining unit

all [of the Company’s] Full-Time employees at its Drug City Store in Orangeville, Ontario, save and except Store Manager and Assistant Store Manager, persons above the rank of Assistant Store Manager, pharmacists, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period;

Part-time unit

all [of the Company’s] Part-Time employees at its Drug City Store in Orangeville, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except pharmacists.

3. During the six and a half days that were devoted to hearing evidence and argument regarding this application, eight persons were called as witnesses (including one person recalled as a reply witness). In making the findings and reaching the conclusions set forth in this decision, we have duly considered all of that oral evidence, as well as the documentary evidence that has been placed before us, the submissions made by the parties’ representatives, and such factors as the firmness of the witnesses’ respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, and their demeanour. We have also assessed what is most probable in the circumstances of the case, and considered the inferences which may reasonably be drawn from the totality of the evidence.

4. Ms. Sawyer represented herself and the other applicants on July 9, 1990, the first day of hearing of this application. On August 13, 1990, which was the second day of hearing, Paul B. Neilson, an Industrial Relations Consultant, appeared on behalf of the applicants and requested an adjournment on the grounds that he had just been retained the preceding weekend. After hearing submissions regarding that request, which was supported by the Company but opposed by the Union, the Board made the following unanimous oral ruling:

The need for expedition in Board proceedings is well established in the Board’s jurisprudence. In the absence of consent by all of the parties, the Board will generally not grant an adjournment in the absence of exceptional circumstances beyond the control of the party requesting the adjournment. In the instant case no such circumstances are present. If prior to the first day of hearing the applicants were unaware of their right to be represented by counsel or an agent, they clearly became aware of that right on July 9, 1990, the first day of hearing, at which the intervener was represented by counsel. Although it appears that Mr. Neilson was only recently retained to represent the applicants, we are satisfied that if the applicants had exercised due diligence, they would have been in a position to retain and instruct counsel or an agent reasonably in advance of today’s hearing. Accordingly, the applicants’ request for an adjournment is denied. However, as suggested by the respondent, we are prepared to recess today’s hearing until after lunch, in order to afford Mr. Neilson an opportunity to further familiarize himself with the applicants’ case. Accordingly, this hearing is recessed until 1:00 p.m.

5. Prior to his retirement in September of 1988, Mr. Neilson was Corporate Vice-President of Industrial Relations for The Oshawa Group Limited, which is the intervener’s parent company. In 1982, Mr. Neilson was on the bargaining committee that negotiated on behalf of the intervener in the first round of collective bargaining following the Union’s certification. There is no evidence

that the intervener or its parent company had any involvement in the selection of Mr. Neilson as the applicants' representative, nor that any of the employees who signed the petitions described below were aware that he would subsequently become involved in the proceedings. Under the circumstances, we are satisfied that his subsequent involvement bears no relevance to the issue of the voluntariness of the petitions.

6. As indicated above, this application pertains to bargaining rights held by the Union in respect of persons employed at the intervener's Drug City Store (the "store"), which is the only one of the intervener's stores in respect of which a union holds bargaining rights. The store is located in a strip plaza in Orangeville. There is a pharmacy area behind the "front shop" (general merchandise) area of the store. The front shop is managed by Rick Ashley, the store's General Merchandise Manager. Behind the pharmacy area are the store's stockroom, receiving area, washrooms, and two upstairs offices, including Mr. Ashley's office. There is also an eight foot square lunchroom between the receiving area and the stockroom. The offices are located opposite the lunchroom in a raised area which is reached by a stairway with about six steps.

7. Ms. Sawyer is a general clerk whose primary work areas in the store are the receiving area and the stockroom. She also works in the front shop, performs some paper work on the table in the lunchroom, and is responsible for removing outdated letters and memos from the lunchroom bulletin board, which has a centre-framed area for Union notices. Ms. Sawyer has become quite dissatisfied with the Union and, in particular, with its full-time steward, Primrose Short, and its part-time steward, Margaret Studley. On October 31, 1989, she wrote a three and a half page letter to John Fuller, the Union's Business Agent, in which she expressed the opinion that the local was "in danger of dissolving" because the stewards were "making a comedy of [the] local and what it stands for". Her concerns in that regard were heightened by an incident which occurred in the store in early April of 1990, as a result of which Lisa Brand, who was a part-time employee at that time, was disciplined by the Company for refusing to follow certain instructions from Ms. Short, who was the senior clerk in charge of the front shop area of the store on the Sunday on which that incident occurred. It is not necessary for purposes of this decision to detail Ms. Sawyer's concerns about that incident and the matters raised in her letter, nor is it necessary or appropriate for us to express any opinion about the validity of her concerns. It is also unnecessary to describe what was said about that incident at a meeting that took place on April 18, 1990, as we are satisfied that nothing which occurred at that meeting is of assistance in deciding the matter before us.

8. Ms. Sawyer submitted a written resignation to Mr. Ashley on May 14, 1990. It was to be effective on May 25, but as a result of a twenty or thirty minute discussion with Mr. Ashley during the afternoon of May 14 in the restaurant next door to the store, she revised the effective date to July 21. During that discussion, Mr. Ashley told Ms. Sawyer that she was a good worker and that he did not want to lose her. Since he believed that one of the reasons she had decided to quit was her concern about lifting heavy merchandise without adequate assistance, he indicated that he had begun to make arrangements for a meeting to be held in the store with regard to receiving and lifting of heavy merchandise. He also stated that "things are bound to get better", and asked her to "hang in there for a while".

9. Ms. Sawyer testified that she got the idea of preparing petitions in support of decertifying the Union from discussions with friends, relatives, and co-workers about her concerns with the Union and its stewards. She filed two petitions with the Board in support of this application. In accordance with the Board's usual practice, the signatures on those petitions were numbered by the Board's staff (T1, T2, T3, etc.) to enable the Board to receive testimony concerning the circumstances in which the signatures were obtained without divulging the names of the persons who signed. However, that numbering created some initial confusion in the instant case since the

undated petition that was actually the first one signed by employees was numbered as if it were second. It contains four signatures which also appear on the petition dated May 22, 1990, and which were numbered by the Board's staff in the order in which they appear on the latter.

10. The first petition (also referred to in this decision as the "posted petition") is written on the back of a 9" x 11" sign (the front of which reads: SMOKING IS ALLOWED ONLY IN THE LUNCHROOM AND ONLY AT DESIGNATED TIMES). It bears Ms. Sawyer's signature and the signatures of four other full-time employees, including Barbara Whitfield, who also testified before the Board in support of the petitions. The second petition (which is written on a smaller piece of notebook paper) was signed by Ms. Sawyer, Ms. Whitfield, two of the three other full-time employees who signed the posted petition, and seven part-time employees.

11. Ms. Whitfield has been employed at the store since 1980. As one of the store's senior clerks, her duties and responsibilities included opening and closing the store, authorizing cheques, taking care of transaction voids and refunds, directing other staff members in accordance with written instructions from Mr. Ashley, doing some banking and book work, and supervising front shop staff in Mr. Ashley's absence. In addition to those duties which occupy about a third of their time, senior clerks carry out a number of tasks also performed by general clerks, such as looking after an assigned section of the store and operating a cash register. A job exchange was arranged in May of 1989 between Ms. Whitfield, who was a senior clerk in the pharmacy area of the store, and Ms. Short, who was a senior clerk in the front shop. That exchange was set up on a three-month trial basis, but was subsequently made permanent by mutual agreement.

12. Following discussions with Mr. Ashley and Ed Holmes, the intervener's Manager of Human Resource Services, Ms. Whitfield became a "Manager Trainee" in mid September of 1989. Her appointment to that position was noted in the November/December 1989 edition of the "Oshawa Observer" (which is a staff magazine published by The Oshawa Group Limited), and was common knowledge among store employees. As a Manager Trainee, Ms. Whitfield attended a Company seminar on "Guidelines and Effective Management", and took two community college courses at Company expense. Although she continued to perform essentially the same work as before becoming a Manager Trainee, she was given greater exposure to various Company reports and to the Company's inventory control system. She was also exempted from the normal requirement of punching in and out. When he was asked by the Union during cross-examination why, unlike all of the other bargaining unit employees, Ms. Whitfield was not required to punch in and out, Mr. Ashley replied: "It was a decision made as an assistant, basically on my recommendation, because if someone can't manage their own time, there is no point in pursuing it." (Ted Smith, the intervener's Vice-President of Human Resources, testified that Ms. Whitfield should have been required to continue punching in at the start of her workday and out at the end of her workday, and should only have been exempted from punching in and out for lunch. He attributed her total exemption to an administrative oversight.)

13. Ms. Whitfield does not have any authority to hire or fire employees, nor can she grant them time off or alter their wages. Her only involvement in disciplinary action arose out of an incident that she witnessed in the store. When she overheard a general clerk swear in the presence of a customer on May 10, 1990, Ms. Whitfield admonished her and reported the incident to Mr. Ashley, who arranged a meeting with the employee and her Union steward at which the employee was verbally reprimanded for that and another incident. Ms. Short was present at that meeting in her capacity as full-time Union steward. Ms. Whitfield was also present at that meeting. There is conflicting evidence concerning the reason for her presence. Ms. Short testified that she asked why Ms. Whitfield was there and was told by Mr. Ashley that Ms. Witfield was there in a management position or in the position of management. She could not remember which of those two phrases

Mr. Ashley used, but did recall that the word “management” was in the phrase. Mr. Ashley, on the other hand, testified that Ms. Short asked him if Ms. Whitfield was there as a member of management and was told that she was not. However, he also testified that he normally arranges for one of the pharmacists to be in attendance with him at disciplinary meetings but was unable to do so on this occasion because no one was available. He further stated, “She [Ms. Whitfield] was there as a third party because I don’t like going into a meeting without someone else there.” When asked if Ms. Whitfield participated at all in any discussion at the meeting, Mr. Ashley replied, “I don’t believe so.” Ms. Whitfield told the Board that she was unable to recall Ms. Short raising the matter of whether she was there as a management representative. She also testified that she did participate in the discussion at the meeting.

14. In early May of 1990, Ms. Whitfield was promoted to the position of Merchandising Supervisor, to reflect her successful completion of the first level of management training. She received a raise at that time, and gained access through the Company’s Head Office to more advanced supervisory training and training with respect to report reading and analysis. She also obtained greater access to information concerning Company operations. However, she remained in the (full-time) bargaining unit as her duties and responsibilities were essentially unchanged.

15. The Company has a non-solicitation policy that is set forth as follows in the employee handbook, which is distributed to each new employee and which is also available in the store for reference:

HANDBILLS AND SOLICITING

In order that you are not pestered or annoyed with unwanted solicitations, Kent Drugs protects its employees from this sort of thing by prohibiting distribution of handbills and catalogues, as well as soliciting of memberships, pledges, subscriptions, petitions or sale of articles. This applies equally to employees as well as outsiders.

The evidence indicates that when management becomes aware of a contravention of that policy, steps are generally taken to enforce it.

16. Shortly after arriving at the store on Wednesday, May 16, 1990, Ms. Sawyer approached Mr. Ashley in the stockroom and asked if she could post something on the bulletin board. During her testimony before the Board, Ms. Sawyer initially stated that Mr. Ashley said “no”. However, during cross-examination by the Company, she was asked, “Is it possible that when you approached [Mr. Ashley], you asked him if you could post something and he said ‘okay’ without asking what was to be posted”, to which she replied, “It’s possible”. During cross-examination by the Union, Ms. Sawyer stated: “I remember I asked if I could post a sign. I think he said ‘no, unless it has something to do with union business’. I think he said that. I’m not sure.” Mr. Ashley testified that he had a brief conversation with Ms. Sawyer in the stockroom first thing in the morning on May 16. It was his evidence that she asked him if she could put something up on the bulletin board and that he said “okay” without knowing or asking what it was.

17. Later that morning, Ms. Sawyer took down the aforementioned smoking sign that was posted on the bulletin board in the lunchroom and signed her name on the back of it after writing the following heading:

Notice of Decertification

All those wishing to decertify from this union please sign here.

She then re-posted it with that side facing outward. Two other full-time employees (T12 and T2)

signed the posted petition while Ms. Sawyer was in the lunchroom on her lunch break that day. She also saw Ms. Whitfield (T3) sign it a few minutes later. (T12 signed only the posted petition and not the second petition (described below) because she was away on vacation when the second petition was circulated.) The posted petition remained on the bulletin board for approximately an hour, including the lunch break which (according to her time card) Ms. Sawyer took from 12:12 to 12:39 p.m. that day. The bulletin board is visible to anyone who walks by the lunchroom, including Mr. Ashley who regularly passes by that area. Mr. Ashley noticed the petition while it was posted there, and went into the lunchroom to read it. No one else was in the lunchroom at that time. After reading the heading and the five signatures on the posted petition, Mr. Ashley, who was unsure of what to do, telephoned Mr. Smith, the aforementioned Vice-President of Human Resources. Mr. Smith, who (in his own words) has been aware for "at least two decades" that "if the employer were involved [in a termination application] in any way, the application would fail", instructed Mr. Ashley to see that the posted petition was removed by whomever had put it up and "to advise the party or parties that that sort of thing could not be allowed in the store". After completing his preparation for the meeting that he was scheduled to attend that afternoon at the Company's Head Office, Mr. Ashley approached Ms. Sawyer in the stockroom, asked her to remove the posted petition, and told her that "union business of that kind couldn't be performed on store time in the store". Mr. Ashley then left the store to attend the aforementioned meeting. After he was gone, Ms. Sawyer removed the sign from the bulletin board, turned it over, and reposted it on the bulletin board with the smoking instructions facing outward. When she left work that day shortly after 5:30 p.m., Ms. Sawyer removed the sign from the bulletin board and took it home with her.

18. Ms. Sawyer wrote the heading on the second petition in the restaurant next door to the store on Tuesday, May 22, 1990. She initially told the Board that she did this during one of her breaks that day. However, later in her testimony she contradicted that evidence by stating: "I didn't write it out on break. It was before work." Under further questioning about that matter, she indicated that she could not remember whether it was on her break or before work started.

19. The heading on the second petition reads:

We, the undersigned, wish to decertify from the Retail, Wholesale and Department Store Union, A.F.L.-C.I.O.-CLC and its local 414. We do so voluntarily and with out duress.

Dated this 22nd day of May 1990.

Ms. Sawyer copied the name of the Union from a collective agreement booklet which she obtained from Ms. Whitfield. Ms. Sawyer signed the second petition in the lunchroom later that day during her lunch period. Another full-time employee (T2) and Ms. Whitfield (T3) also signed it at that time. Ms. Sawyer subsequently gave it to T4, another full-time employee, who was leaving the store on her afternoon break. When T4 returned the petition to Ms. Sawyer fifteen minutes later, it contained T4's signature. Neither Ms. Sawyer nor anyone else who testified before the Board saw T4 sign the second petition. Thus, there is no direct evidence before the Board concerning where she signed and who, if anyone, was present when she did so. There is also no evidence before us as to whether or not T4 showed the petition to anyone while it was in her possession.

20. In addition to those four signatures, the second petition also bears the signatures of seven part-time employees (T5-T11). Ms. Sawyer testified that T5 signed in her presence in the aforementioned restaurant during their afternoon break. She also told the Board:

All the signatures were obtained on the same day.... T6 to T11 signed in the lunchroom before they started work and after I had punched out. This was between 5:20 and 5:30.

During cross-examination by Company counsel, Ms. Sawyer reiterated that she “punched out early” that day. She repeated that assertion during cross-examination by the Union, in which she stated that she was scheduled to work from 9:00 a.m. to 5:30 p.m. that day, but punched out at 5:20 p.m. and was not paid for that ten-minute period. However, her time card indicates that she did not punch out before 5:30 p.m. that day. Moreover, the time cards (produced by the Company at the Union’s request) also indicate that two of the six employees (who, according to Ms. Sawyer, signed in the lunchroom between 5:20 and 5:30 p.m. “before they started work”) had in fact punched in to commence work considerably earlier than 5:30 p.m. that day. Those cards further indicate that some of the others in that group of six did not work at all that day, a fact which Ms. Sawyer later acknowledged by changing her evidence to indicate that although they were not all scheduled to work that day, they were all there. She also stated: “They knew something was going on. Word gets around. It’s a small store.”

21. Ms. Sawyer subsequently mailed the two petitions to the Board, together with the application form (Form 17) which she obtained by telephoning the Board’s office.

22. Section 57(3) of the Act provides as follows:

Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

23. The various principles, considerations, and concerns which the Board generally takes into account in determining whether or not an applicant has satisfied the onus of establishing the voluntariness of a termination petition are well established in the Board’s jurisprudence. See, for example, *Johnson Matthey Limited*, [1987] OLRB Rep. Apr. 518; *Domus Building Cleaning Co. Ltd.*, [1986] OLRB Rep. March 319; *Dynasty Inn*, [1986] OLRB Rep. March 326; *Crothall Services Limited*, [1984] OLRB Rep. Jan. 22; *Irwin Toy Limited*, [1983] OLRB Rep. Apr. 536; *Westinghouse Canada Inc.*, [1982] OLRB Rep. July 1098; *Charterways Transportation Limited*, [1981] OLRB Rep. Aug. 1108; *Upper Canada Glass*, [1981] OLRB Rep. Aug. 1181; *Ontario Hospital Association*, [1980] OLRB Rep. Dec. 1759; and *Northern Telecom Canada Limited*, [1979] OLRB Rep. Apr. 330. As submitted by counsel for the intervener, the Board is less inclined to draw inferences adverse to the voluntariness of a termination petition than to a petition filed in respect of a certification application, because of the absence of a sudden “change of heart”. See, for example, *Ontario Hospital Association*, *supra*, at pages 1768-9:

31. The sole issue before the Board in every case regarding a “petition” is the voluntariness of the acts of signing. The Board has often drawn a distinction between petitions which are filed in connection with an application for certification, and those which accompany an application for termination of bargaining rights. In the former case, the Board has said that it must be sensitive to the role which management influence, devious or otherwise, may have played in causing employees who have only recently signed a card in support of a union to subsequently sign a petition which *opposes* the union. In the case of a termination application, the Board is not less concerned about influence by the employer, but there may, as a practical matter, be any number of reasons, including the mere passage of time, to readily explain the employees’ apparent change of hearts. As the Board commented in *N.J. Spivak Limited*, [1977] OLRB Rep. July 462:

6. In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a termination application under section 49 [now section 57] of the Act does not represent a sudden change of heart by those who sign

it. The operation of section 49, a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union's certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 of the Act.

See also *Northern Telecom Canada Limited*, [1979] OLRB Rep. April 330.

However, the issue before the Board is essentially the same as the issue which the Board must determine in a certification application in which a petition has been filed, i.e., whether the petition is a voluntary expression of the true wishes of the employees who signed it. As noted in *Almag Aluminium Ltd.*, [1983] OLRB Rep. Nov. 1779, at paragraph 15, "the Board has consistently interpreted the word 'voluntary' in section 57(3) to mean that the petition is free of actual or perceived employer influence and that employees who sign a petition are not motivated by a perceived threat to their job security or by concern that failure to sign would be communicated to the employer or could result in reprisals."

24. Although the matter is not entirely free of doubt, we are prepared to assume for purposes of this decision that Ms. Sawyer's dissatisfaction with the Union and its stewards prompted her to prepare the aforementioned petitions and file this application with the Board, and that she did so without any support or encouragement from Mr. Ashley or any other member of management. However, having duly considered all of the oral and documentary evidence adduced before us, the submissions made on behalf of the parties, and the numerous prior decisions to which we were referred by counsel for the intervener, we have concluded, for the reasons set forth below, that the applicants have not met the onus of establishing on the balance of probabilities that the petitions represent a voluntary expression of the true wishes of their signatories.

25. Although she may not have intentionally attempted to mislead the Board, Ms. Sawyer was not a reliable witness. As indicated above, her testimony proved to be inaccurate concerning a number of significant matters. She initially testified that Mr. Ashley said "no" when she asked him if she could post something on the bulletin board. However, during cross-examination by the Company, she acknowledged that it was "possible" that Mr. Ashley said "okay". She was also unable to recall Mr. Ashley subsequently telling her to take down the posted petition. While it is understandable that a witness would be unable to recall minor details of an occurrence that took place almost two months earlier, Ms. Sawyer's memory lapses concerning those two significant and relatively unusual conversations indicate to us that she either has a rather poor memory or was attempting to avoid giving testimony which might weaken her case. Ms. Sawyer's inaccurate testimony regarding the signatures of T6 to T11 also demonstrates her unreliability as a witness. As indicated above, she told the Board that those six persons signed the (second) petition in the lunchroom between 5:20 and 5:30 p.m., before they started work and after she had punched out. However, the Company's time cards indicate that Ms. Sawyer did not punch out before 5:30 that day, that two of the six employees had in fact punched in to commence work considerably earlier than 5:30 that day, and that some of the others in that group of six did not work at all that day.

26. It appears from the totality of the evidence that Ms. Sawyer obtained at least some of the signatures on Company premises during working hours. While that fact alone is not necessarily fatal to the voluntariness of a petition (see, for example, *Kilgoran Hotels Limited c.o.b. as Ye Olde Brunswick Tavern*, [1975] OLRB Rep. March 240), in the context of a case such as this one in which the Company has, to the knowledge of its employees, a written non-solicitation policy which

is generally enforced, it provides some support for inferring that employees would likely have thought that Ms. Sawyer was circulating the petition with the support or consent of management.

27. That such an inference may reasonably be drawn in the instant case is even more apparent from the circumstances surrounding the posting of the first petition on May 16. Although Ms. Sawyer initially testified that Mr. Ashley denied her permission to post it on the bulletin board, it is clear from the totality of the evidence that he in fact gave her permission to post something on the bulletin board that day, without knowing or asking what it was she wanted to post. While his ignorance of what was to be posted precludes a finding of actual employer support, it does not preclude the drawing of an inference that employees who saw the petition posted there would reasonably conclude that it was posted with the support or consent of management.

28. Moreover, the signatures on the posted petition were clearly not obtained in circumstances that would permit employees to feel reasonably assured that management would not become aware of which employee signed it in support of decertification of the Union and which employees did not. As indicated above, that petition was posted on the bulletin board in the lunchroom for approximately an hour on May 16. The bulletin board is visible to anyone walking by the lunchroom, including Mr. Ashley who regularly passes by that area. Indeed, the evidence establishes that Mr. Ashley did in fact notice the petition posted on the bulletin board, whereupon he entered the lunchroom and read the heading and the five signatures on it.

29. Another material deficiency in the applicant's case is the absence of cogent evidence concerning the circumstances in which T4 signed the second petition. As indicated above, that petition was out of Ms. Sawyer's possession for approximately fifteen minutes when she gave it to T4, who was leaving the store on her afternoon break. Since neither Ms. Sawyer nor anyone else who testified before the Board saw T4 sign that document, there is no direct evidence concerning where she signed it and who, if anyone, was present when she did so, nor is there any evidence before us as to whether or not T4 showed the petition to anyone while it was in her possession. Thus, the situation is distinguishable from the cases cited by Company counsel in which, although there was no eye-witness testimony as to the actual inscribing of each signature, the evidence concerning the manner of obtaining the signatures was sufficient to enable the Board to conclude that no member of management was present when the signers affixed their signatures (see, for example, *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)*, [1967] OLRB Rep. March 976, at paragraphs 2 and 3, and *Pyrotenax of Canada Ltd.*, 60 CLLC ¶16,170, at pp. 865-6).

30. Another fact which militates against finding the petitions to be voluntary in the instant case is the presence of Ms. Whitfield's signature on each of them. Although she remained a bargaining unit member at all material times, Ms. Whitfield had been a Manager Trainee since mid September of 1989 and, at the time the petitions were signed, had recently been promoted to the position of Merchandising Supervisor. Her participation in the aforementioned disciplinary meeting concerning the "swearing on the floor" incident confirms that she had a closer nexus with management than did other bargaining unit employees. As indicated above, there is conflicting evidence regarding whether or not Mr. Ashley told Ms. Short that Ms. Whitfield was there as a member of management. However, it is unnecessary to resolve that conflict as, regardless of what Mr. Ashley told Ms. Short, it is clear from the totality of the evidence that Ms. Whitfield was at that meeting because she had heard the employees swear on the floor and verbally admonished the employee for doing so, and because Mr. Ashley, who did not want to attend the meeting alone, saw her as an appropriate substitute for the pharmacist. It is reasonable to infer that Mr. Ashley found Ms. Whitfield to be suitable for that role because her position as a Manager Trainee who had recently been promoted to Merchandising Supervisor led him to conclude that her interests

were more closely allied with those of management than with those of the Union. In the totality of the circumstances, it may reasonably be inferred that bargaining unit employees, including signers of the petition, would also have perceived Ms. Whitfield in that light, in view of her status as a Manager Trainee who had recently been promoted to the position of Merchandising Supervisor and who, unlike all of the other bargaining unit employees, was not required to punch a time card.

31. Although some of the aforementioned factors might not, if considered in isolation, lead inexorably to the rejection of a petition, their cumulative effect in the circumstances of the instant case leaves the Board unable to conclude that the signers of the petitions, other than Ms. Sawyer and Ms. Whitfield, have voluntarily signified in writing that they no longer wish to be represented by the Union.

32. For the foregoing reasons, this application is hereby dismissed.

DECISION OF BOARD MEMBER ROSS W. PIRRIE; March 7, 1991

1. I disagree with the majority decision. My interpretation of the evidence and assessment of the witnesses giving that evidence does not lead me to the conclusion that only Ms. Sawyer and Ms. Whitfield signed the petitions voluntarily. I heard nothing to cause me to infer that the other signators to the petitions did not also sign voluntarily. To assume to the contrary is to imply some form of management involvement in the petition activity or some form of implicit or explicit threat felt by employees in the bargaining unit to sign the petition. Again, I heard nothing to cause me to believe this to be the case.

2. In all the circumstances of this case, I would find the petition voluntary and order a vote to ascertain the wishes of the members of the bargaining unit with respect to continued representation by the union.

2739-90-G United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 221, Applicant v. **Lewin Kingston**, A Division of Brousseau-Robidoux Enterprises Ltd., Respondent

Construction Industry - Construction Industry Grievance - Employer agreeing to hire only union members but collective agreement excluding "owners" involved in "supervising" from bargaining unit - Non-union employees issued common shares by employer and subsequently voting to make themselves directors - Whether employer violating collective agreement - Board holding that shareholder/directors not "supervising" within meaning of collective agreement - Board doubting, but not deciding, that shareholder/directors "owners" within meaning of collective agreement - Grievance allowed - Board remaining seized with respect to remedy

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *J. Lear* and *C. A. Ballentine*.

APPEARANCES: *A. J. Ahee* and *J. Telford* for the applicant; *Douglas Robidoux* and *Robert Little* for the respondent.

DECISION OF THE BOARD; March 1, 1991

1. The applicant has referred this grievance to the Board pursuant to section 124 of the *Labour Relations Act*.
2. At the conclusion of the hearing on February 5, 1991, the Board provided an oral decision, upholding the grievance, and remaining seized with respect to damages. We now provide our reasons.
3. The grievance alleges that the respondent employer has improperly hired non-union members, in breach of various provisions of the collective agreement. Alternatively, the applicant argues that the employer has improperly subcontracted or otherwise transferred work coming under the collective agreement.
4. With a few exceptions, the facts were not in dispute. For many years, the company has operated its business in the Kingston area. The principal owner for most of this period was Douglas Robidoux. He is also the current President of the Mechanical Contractors Association of Kingston. It is common ground that the company was engaged in doing work in the industrial, commercial, and institutional sector of the construction industry ("I.C.I.") and that the work in question is work covered by the ICI collective agreement, to which the employer is bound.
5. For a number of years, in addition to employing union members, Douglas Robidoux hired various close relatives to work for the business. Douglas and his brother Harold were union members. However, several other brothers (Frank, David, and Stanley Robidoux) working for the company never joined the union, although they were continuously performing ICI bargaining unit work. There was also one other employee, Norman Proulx, who was performing bargaining unit work and was not a union member. Up until approximately May, 1989, the business agent of the union did not object to the brothers who were not members of the union, or to Norman Proulx, working for the company. The business agent died and a new business agent was chosen, John Telford. Mr. Telford shortly thereafter became aware that the company was employing numerous family members, and Mr. Proulx, who were not members of the union, in apparent violation of the collective agreement. Nevertheless, no steps were taken against the company at that time.
6. In May, 1990, during the province-wide strike in the ICI sector by members of the union, the company continued work on its projects, largely because it was employing non-union Robidoux family members. The union then objected to these employees performing bargaining unit work.
7. After the strike ended and a new collective agreement was signed, the company continued to employ its non-union family members and Mr. Proulx, along with employees who were members of the union. The union was unable to get the company to comply with its collective agreement obligations in respect of hiring only union members and filed a grievance in November, 1990. That grievance was settled and endorsed by Board decision, the company acknowledging that it was bound by the ICI collective agreement, that it had breached that agreement (in particular Article 12), and agreeing to pay \$8,000.00 by way of damages for that breach.
8. Shortly after that grievance was settled, in a conversation with John Telford, Mr. Robidoux agreed that the only Robidoux family members who would work on ICI sites thereafter would be himself and Harold, both of whom were union members. Mr. Telford repeated and maintained the union's position, that non-members of the union could not perform bargaining unit work. Mr. Telford did agree, however, to provide a period of grace of approximately two weeks to Mr. Robidoux, in order to enable him to restructure the workplace. This two week period was to allow Mr. Robidoux to deal with his family and Mr. Proulx, who would either have to cease being employees, or would have to try to join the union. This interval was also granted so the company

could continue working on its on-going projects while Mr. Robidoux arranged to comply with the collective agreement provisions. It would serve neither party if the company had to abandon its projects.

9. Shortly after this conversation with Mr. Telford, Mr. Robidoux arranged a meeting with counsel for the company. As a result, the company was restructured, with common shares issued, and Douglas Robidoux transferred or assigned some of his common shares in the company to each of Frank, David and Stanley Robidoux, his brothers who were non-union members, and to Laurie Robidoux, another non-union relative working for the company. And Harold Robidoux transferred some of his common shares to Norman Proulx. Now all the non-union employees had become shareholders. The shareholders then held the first annual meeting and voted to make themselves directors in the corporation. The non-union employees had now also become directors. For purposes of our decision, we accept counsel's assertion that the family members and Mr. Proulx owned one hundred per cent of the common shares in the company.

10. There was no accompanying change of any sort in the employment duties and responsibilities of the new directors and shareholders, nor in the work they did, their manner of payment, and so on. Their employment relation with the company and the work they were performing did not change. Douglas Robidoux testified that he "understood that restructuring the company would allow him to do the work he had been doing for years."

11. A few weeks later, on one of his periodic checks of work sites, Mr. Telford discovered that the company was still employing the non-union Robidoux family members and Mr. Proulx to perform bargaining unit work. Accordingly, the union filed the instant grievance, dated December 21, 1990. After receipt of the grievance, counsel for the company advised the union of the corporate restructuring and his conclusion that the company was therefore not in breach of the collective agreement.

12. Turning to the individuals in question, Frank Robidoux has been an employee for 6 years and an apprentice plumber and steamfitter for approximately two and a half years. From time to time, he is the most senior employee on a particular job site, and may be involved in projects at more than one site. Stanley Robidoux has been employed by the company for nine years, and acts primarily as a service man. He has no licence nor is he an apprentice. He is a gas fitter, and usually goes out on service calls on his own. If he feels that additional help is needed on a call, he will phone for additional people and when they arrive tell them what to do. David Robidoux has been an employee for three years. He is a welder, but neither an apprentice or journeyman plumber or steamfitter. On occasion, he will call for others to come and assist him with his welding. Norman Proulx has only been employed for one year. He is a second year apprentice, doing service and repair work, and his duties and responsibilities are similar to those of Stanley Robidoux. Both Stanley and David Robidoux have been laid off on several occasions in the past, the most recent lay-off being David's in July, 1989. Frank, Stanley and Norman have all on occasion received bonuses upon completion of a particular job.

13. Douglas Robidoux testified that management decisions have often been made at meetings of this group of family members and Mr. Proulx. Joint decisions were said to be made on occasion.

14. The applicable provisions of the collective agreement read as follows:

ARTICLE 11 - SUB-CONTRACTING

11.1 Recognizing that the Contractor can sub-contract, no Contractor shall directly or indirectly

sublet or sub-contract or otherwise transfer to any employee or any other employer not signatory to a U.A. agreement any of the work coming under the jurisdiction of this agreement

ARTICLE 12 - UNION SECURITY

12.1 As condition of employment, an employee must be in good standing with the Union.

APPENDIX 12

ZONE 12 KINGSTON - LOCAL UNION 221 HIRING

Article 101

101.1 The Company agrees to hire only members of Local 221 as long as the Union is able to supply mechanics and apprentices to take care of the needs of the employer, and the Company, when hiring, shall give the Union fair notice of their requirements, which shall be at least three days where possible. If the Union cannot supply mechanics who are members of the United Association, Local 221, the Union will supply mechanics who are members of the United Association.

OWNERS AND MANAGERS

Article 113

113.1 Owners and Managers whose duties involve supervising the work of others are not included in the bargaining unit.

15. The employer claims that the corporate restructuring was in no way a plan or an attempt to evade the requirements of the *Labour Relations Act*. Rather, it was a restructuring to reflect the reality of the company and how it had actually been operating. The employer acknowledged that there was no change in job-related duties or responsibilities of the new shareholders and directors. The employer submits that because of past practice, as the union had not initially or earlier objected to the Robidoux non-union family members working, it would not be fair to now allow the union to object. It submits since the current collective agreement has already been signed, that it would not be fair for the union to obtain any remedy until the current agreement has expired. Alternatively, the employer submits that the shareholder-directors fall within the provisions of Article 113.1 of Appendix 12, and the company is not therefore in breach of the collective agreement. Under the provisions of that Article, owners and managers whose duties involve supervising the work of others are not included in the bargaining unit. The employer submits that the individuals in question are now both owner-operators and are engaged in supervising the work of others, and therefore do not fall within the bargaining unit. The company concedes that for Article 113.1 to apply, an individual must be found by the Board to both be an owner (or manager) and be involved in supervising the work of others.

16. The first submission, that because of past practice it would be inequitable for the union to succeed in the instant grievance, can be disposed of quickly. At the time the current agreement was still being negotiated, the union's business agent put the company on notice that it objected to the use of non-union members by the company, as such practice breached the agreement. At that point, the company knew of the union's position. In the face of the known objection by the union, the company continued to employ non-union members. That the union had allowed this leeway in the past is no reason to preclude it from insisting on its rights in the future, provided ample notice is given. We note as well that the earlier grievance was settled on the basis that the employer admitted its breach of Article 12 of the collective agreement. Article 12.1 requires, as a condition of employment, that an employee must be in good standing with the union. The company has

acknowledged that it cannot employ non-union members. The Board is satisfied that past practice would not lead us to restrict the remedy we would otherwise provide.

17. The alternative argument is that the individuals fall within Article 113.1 of Appendix 12 of the collective agreement, and therefore can perform bargaining unit work even though they are not union members. As noted, the employer acknowledges that for Article 113.1 to apply, one must both be an owner or manager and have duties involving the supervising of work of others.

18. We are satisfied that none of the four men (Frank, Stanley, and David Robidoux, and Norman Proulx), is involved in “supervising the work of others” within the meaning of this Article. Even though some of these employees on occasion call other employees to come and assist them on sites, they would not “supervise” their work. In the skilled plumbing trade, it would be difficult for an employee without plumbing and pipefitting qualifications, to meaningfully supervise the work of journeymen. “Supervising” in Article 113.1 involves more than requesting and utilizing assistance on a job. It involves some meaningful direction and control over the employees. We had no evidence of that. These people were clearly “employees” before the corporate restructuring, and there has been no change in their jobs or treatment since the restructuring. Whatever the effect of their becoming directors and shareholders, the nature of their employment remained unchanged. For the vast majority of their time, these four individuals work with the tools, often performing ICI work. It is clear, both before and after the corporate restructuring, that their jobs were to perform bargaining unit work. Their duties did not include “supervising the work of others” within the meaning of Article 113.1.

19. The other requirement under Article 113.1 is that these people be “owners” of the company. We have some serious doubt that they would be “owners” within the meaning of that Article, given the circumstances. In this respect, see, for example, *Family Services of Hamilton-Wentworth Inc.* 1980 [OLRB] Rep. Feb. 204. However, given our decision that the employees in question were not involved in “supervising the work of others”, we need not decide this issue.

20. In final submissions, the union argued that breaches of Articles 12.1 and 101.1 of Appendix 12 had occurred. For the reasons expressed above, we were satisfied that the company had breached those two articles, and the grievance was therefore upheld.

21. As agreed at the hearing, the Board will remain seized with respect to remedial relief. We note that the union agreed that it would only be seeking token damages from the employer.

1417-90-G International Brotherhood of Painters & Allied Trades Local 1795 Glaziers, Applicant v. Lord & Burnham Inc., Respondent

Construction Industry - Construction Industry Grievance - St. Catharines employer using Burlington contractor's former employees and employees from Hamilton hiring hall for project in Burlington - Whether employees entitled to "out of town allowance" because employer having headquarters in St. Catharines - Board ruling location of employer's residence or headquarters not affecting application of "travelling zone expenses" provision of collective agreement - Grievance dismissed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *D. A. MacDonald* and *D. A. Patterson*.

APPEARANCES: *E. Mitchell*, *G. McMenemy* and *J. Henley* for the applicant; *B. W. Adams*, *C. Dyck* and *C. Ball* for the respondent.

DECISION OF THE BOARD; March 22, 1991

1. This proceeding concerns a grievance which was referred to this Board for arbitration under section 124 of the *Labour Relations Act*. The factual circumstances which give rise to the grievance are not in dispute.
2. The respondent is in the business of manufacturing and selling architectural glass systems. It was at one time also actively in the business of installing glass and glass systems on construction sites. It was and continues to be an employer bound by the terms of the current provincial agreement between the Architectural Glass and Metal Contractors' Association and The International Brotherhood of Painters and Allied Trades and its Ontario Council covering the employment of glazier metal mechanics in the ICI sector of the construction industry ("the 1990 agreement"). At some point in 1989, it bid for and obtained a contract to supply and install skylight systems at the Mapleview Shopping Centre in Burlington.
3. The respondent sublet the installation portion of its contract to a Burlington contractor: Hitech Erectors Inc. ("Hitech"). Hitech commenced performing the installation using employees obtained from the applicant union's Hamilton hiring hall, which it employed pursuant to the terms of the ICI provincial agreement. Installation began in September of 1989. In July of 1990, Hitech ran into financial difficulties which apparently interfered with its ability to complete the contract. The respondent and the general contractor on the project intervened in the last week of July. On August 1, 1990, the respondent took over the completion of the work Hitech had began. It employed the workers who had been working for Hitech on the site and, because the project was behind schedule, obtained additional workers from the union's hiring hall, and employed them all directly to complete the installation of the skylights it had supplied.
4. The applicant's grievance is essentially this: because the respondent has its headquarters in St. Catharines, it should be paying the former Hitech employees and the employees it obtained from the Hamilton hiring hall an "out of town allowance" which the former Hitech employees were not entitled to and did not receive from Hitech because Hitech was headquartered in Burlington.
5. Like its predecessor agreements, the 1990 agreement consists of a main portion applicable to all employment within the Province together with a series of schedules each applicable only within the territorial jurisdiction of a particular local of the International union. Schedule E applies

within the territorial jurisdiction of Local 1795, which encompasses the Counties of Halton, Wentworth, Haldimand, Welland, Lincoln and Niagara. Article XVIII of the main portion of the 1990 agreement provides as follows:

ARTICLE XVIII - OUT OF TOWN WORK

- 18.01 All work performed outside the Travelling Zone or outside the city limits, whichever is applicable, shall be termed out of town work.

- 18.02 Where job length is one (1) day or less and the Company provides the transportation:

- . All employees will be paid at straight time for all travelling time.
- . Meals will be the employee's responsibility.

Where job length is one (1) day or less and the employee is requested by the Company to use his own car:

- . He will be paid at straight time for all travelling time.
- . Where passengers travel in an employee's car, they will be paid at straight time for all travelling time.
- . Meals will be the employee's responsibility.

- 18.03 Where an employee is required by his employer, due to the location and duration of the job, to remain overnight out of town, the employer shall provide for the cost of the room plus meals effective June 1, 1990, broken down as follows:

Breakfast	\$ 5.00
Lunch	6.00
Dinner	13.00
Room	<u>10.00</u> or receipted bill if greater
	\$34.00

If travelling time is to be overnight the Company will provide a sleeping berth and/or hotel room and the employee will be paid at straight time for hours spent in travelling.

Article I of Appendix E contains the following provisions:

ARTICLE I - TRAVELLING ZONE EXPENSES

- 1.01 Hamilton work zones shall extend to a radius of 48 km. from Main and Sherman, Hamilton. Work zones in St. Catharines, Welland and Niagara Falls shall extend to a radius of 48 km. from the City Hall of each City. The 48 km. radius will be made up of five zones from each centre and shall be paid for at the following rates, effective June 1, 1988, regardless of the employee:

- ZONE 1 0 – 16 km. – free
 – Men shall be paid for parking the first day and last day on job, provided that parking receipt is submitted.
- ZONE 2 17 – 24 km. – \$2.20 daily
 ZONE 3 25 – 32 km. – \$3.34 daily
 ZONE 4 33 – 40 km. – \$4.47 daily
 ZONE 5 41 – 48 km. – \$5.50 daily

- 1.02 Zone allowance will only apply when men go direct to work and start at recognized

starting time and stay on the job until the recognized quitting time, except when Company requires him to do otherwise.

- 1.03 Wherever employees travel to jobs other than in the Company's transportation, the zone allowance will apply. When men have to return to the shop from the job site after normal working hours, they will be paid for travelling time at straight time. A maximum of one (1) passenger, and all necessary tools per car is permitted.
- 1.04 Where an employee uses his own car for such purpose he will be paid at overtime rates where overtime is applicable. Zone allowance will not be paid for in-shop work.
- 1.05 For multiple journeys within the zones where an employee uses his own car at the Company's request, he will be paid Car Allowance, in lieu of zone allowance.

It is apparently common ground that when an employee is performing work which is "termed out of town work" by virtue of Article 18.01 and the applicable local schedule, the employer is obliged to pay the employee the allowance provided for in Article 18.03 whether or not the employer expressly requires or necessity otherwise dictates that s/he remain "out of town" or away from home overnight. It also seems to be common ground that "Travelling Zone" in Article 18.01 and "work zone" in Article 1 of Schedule "E" mean the same thing.

6. The Maplevew Shopping Centre site was less than sixteen kilometers from Main and Sherman, Hamilton, and more than forty-eight kilometers from the St. Catharines City Hall. The respondent takes the position that it was entitled, as Hitech had been, to treat this project as falling within Hamilton travelling zone number 1 and pay its workers accordingly. It says that on a plain reading of Article 1.01 of Appendix E, work will not be "out of town work" if it falls within a work zone centred on any of the four cities referred to in Article 1.01. As the work in question here falls within zone 1 centred in Hamilton, the grievors were entitled to no more than they received when employed by Hitech.

7. The applicant takes the position that the respondent was obliged to pay its workers as though the project was "out of town work" within the meaning of Article XVIII of the main portion of the provincial agreement because the respondent, unlike Hitech, has its headquarters in St. Catharines. It acknowledges that a contractor whose headquarters is not in any of the four cities referred to in Article 1.01 it will have the benefit of all four work zones. It says, however, that a contractor which has its headquarters in one of those four cities has the benefit only of the work zone centred on that city. It is unable to point to any provision of the collective agreement or of Appendix E which refers to the residence of the contractor as having any effect on its obligations. It says that this restriction on local contractors results from some understanding arrived at during bargaining for the collective agreement which covered the period April 1, 1988 to March 31, 1990 ("the 1988 agreement").

8. Apart from the dollar figures in Article 18.03, the language of Article 18 was the same in the agreement covering April 1986 to March 1988 ("the 1986 agreement") as it was in the 1988 and 1990 agreements, but Article 1.01 of Appendix E to the 1986 agreement read as follows:

ARTICLE I - TRAVELLING ZONE EXPENSES

- 1.01 Hamilton work zones shall extend to a radius of 48 km. from Main and Sherman, Hamilton. This area will be made up of five zones, each radiating from Main and Sherman, Hamilton and shall be paid for at the following rates effective March 26, 1984 regardless of the residence of the employee:

ZONE 1 0 – 16 km. – free
 – Men shall be paid for parking the first day and last day on job, provided parking receipt is submitted.

ZONE 2 17 – 24 km. – \$2.10 daily

ZONE 3 25 – 32 km. – \$3.18 daily

ZONE 4 33 – 40 km. – \$4.26 daily

ZONE 5 41 – 48 km. – \$5.50 daily

- 1.02 Zone allowance in Hamilton will only apply when men go direct to work and start at recognized starting time and stay on the job until the recognized quitting time, except when Company requires him to do otherwise.
- 1.03 Wherever Hamilton men travel to jobs other than in the Company's transportation, the zone allowance will apply. When men have to return to the shop from the job site after normal working hours, they will be paid for travelling time at straight time. A maximum of one (1) passenger, and all necessary tools per car is permitted.
- 1.04 Where a Hamilton employee uses his own car for such purpose he will be paid at overtime rates where overtime is applicable. Zone allowance will not be paid for in-shop work.
- 1.05 For multiple journeys within the zones where a Hamilton employee uses his own car at the Company's request, he will be paid Car Allowance.
- 1.06 Work performed outside each other respective city such at St. Catharines, Welland and Niagara Falls shall be termed Out of Town Work.

With the exception of the dollar amounts which now appear in Article 1.01 of the 1990 agreement, the differences between Article 1 of Schedule E to the 1990 agreement and Article 1 of Schedule E to the 1986 agreement came about during the negotiation of Schedule E to the 1988 agreement.

9. George McMenemy has been the business manager and financial secretary of Local 795 for the last seven years. He testified that the changes made to Article 1 of Schedule E during the 1988 negotiations came about as a result of a proposal he made. He said some contractors (other than the respondent) who had headquarters in the cities referred to in Article 1.06 of Schedule E to the 1986 agreement had complained to him that it was unfair that they had to pay the full out of town allowance to members of their permanent crews doing work just outside their local city limits when Hamilton contractors could go farther from their city centre without having to pay that allowance. Mr. McMenemy proposed that there be work zones like the Hamilton ones centred on St. Catharines, Welland and Niagara Falls. When he presented that proposal during the 1988 negotiations, the employer representative requested and was afforded an opportunity to consult with the contractors in those cities to find out what their concerns were before responding to the union's proposal. The employer representative later agreed to the proposal.

10. The union's counsel asked Mr. McMenemy what "the intention" was and he said "the intention" was that the contractors would have the benefit of a work zone centred on the city where they were located but not of the work zone proposed for any of the other cities in the region. We take it that was his intention. He does not say that the employer bargaining agency expressed the same intention. He only goes so far as to say that there was discussion about the plight of the seven or eight smaller contractors located out in smaller centres outside of Hamilton by contrast with the twenty or more contractors located in Hamilton. The focus of discussion was on contractors who employ permanent crews. There is no discussion or focus on contractors who might come from outside the region to perform a project with workers obtained from the Local's hiring hall, nor of the situation in which a contractor supplements its crew by obtaining workers from the hiring hall, nor of any situation analogous to the respondent's.

11. It seems to us that the last question and answer in cross-examination of Mr. McMenemy put to rest any notion that the discussions during negotiations can be taken to have modified the plain meaning of the words adopted in those negotiations. Counsel for the respondent asked Mr. McMenemy why his proposal with respect to Article 1 of Schedule E had not contained any reference to employer residency if he had wanted to make employer residency a factor in the applicability of that provision. Mr. McMenemy replied that to get something into an agreement, you have to have the other party agree. With reference to the written proposal he had made, he said that that proposal was what was presented and that was what was accepted. In our view, that is entirely the point. Whatever may have been discussed, the language proposed, the language now in Schedule E, was the language agreed to. Mr. McMenemy clearly understood that there had been no agreement to anything more than that.

12. Accordingly, we were able to find no support for the notion that the location of an employer's residence or headquarters has any effect on the application of Article 1 of Schedule E. On the plain language of that provision, the work in question here fell within a "work" or "traveling" zone. Accordingly, Article 18.01 of the main agreement did not operate to "term" that work to be out of town work. There is no other way Article 18.03 of the main agreement could possibly be applicable in these circumstances.

13. For these reasons, the grievance was dismissed orally at the conclusion of the hearing in this matter.

0273-90-M C.U.P.E., Local 1582, Applicant v. Metropolitan Toronto Library Board, Respondent

Employee Reference - Whether manager's secretary employed in confidential capacity in matters relating to labour relations - Board dismissing union's argument that bulk of secretary's time involving non-confidential matters -Secretary privy to significant information relating to employer's position respecting grievances and collective bargaining - Board finding that dealing with such matters an integral part of the job - Declaration issuing that secretary not an "employee" within meaning of the Act

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. A. Correll* and *H. Peacock*.

DECISION OF THE BOARD; March 4, 1991

1. This is an application, under section 106(2) of the *Labour Relations Act*, for a determination by the Board of whether Jayne Fillman (referred to in the Board's decision June 20, 1990 decision herein as "Jayne Smith") is an "employee" within the meaning of the Act.

2. In accordance with its usual practice in such applications, the Board authorized a Labour Relations Officer to inquire into and report to the Board with respect to the duties and responsibilities of Ms. Fillman. The report submitted to the Board by the Officer designated to conduct the inquiry consists of the Officer's summary of the inquiry procedure, the testimony of Ms. Fillman, and a single exhibit, Ms. Fillman's job description. A copy of the Officer's report was provided to each party for their review and comments. Each party made written representations to the Board. Neither requested a hearing.

3. We wish to note that the applicant trade union sought to submit copies of job descriptions of bargaining unit employees so that these might be compared to the duties and responsibilities of Ms. Fillman. It appears that the respondent employer objected. In any event, the Officer refused to admit the job descriptions. The issue before the Board is whether Ms. Fillman is an “employee”, not whether she is in the bargaining unit covered by any collective agreement between the parties. We are not persuaded that the job descriptions of persons who are in the bargaining unit are relevant or would be of any assistance to us in determining whether Ms. Fillman is an “employee”.

4. Further, to the extent of the applicant’s representations contain assertions of fact which are not based on the Officer’s report to the Board, we give them no weight.

5. Ms. Fillman is classified as a “Public Relations Secretary”. She reports to the respondent’s Manager of Public Relations. She prepares the materials for and attends monthly management meetings. She takes the minutes of those meetings and subsequently transcribes and distributes these to the appropriate management personnel. Although there is some inconsistency in Ms. Fillman’s testimony in this respect, we are satisfied with the settlement of grievances and collective bargaining are among the things which are discussed at these meeting. Ms. Fillman also attends monthly public relations and programming committee meetings but there is little before the Board which indicates what is discussed in those meetings. Ms. Fillman also prepares budget information and draft budgets in the course of her duties, and types the performance evaluations of the seven bargaining unit employees in the public relations department. On one occasion, she was given advance notice of a discharge of an employee so that she could deal with any inquiries from the media in that respect. Ms. Fillman also types internal and external correspondence and opens mail addressed to the Manager of Public Relations. This mail includes confidential material relating to, for example, draft proposals for collective bargaining.

6. Finally, Ms. Fillman handles the booking of meeting rooms, maintains the public relations departments files, and ensures that the department is adequately stocked with supplies.

7. The matter in issue between the parties is whether Ms. Fillman is employed in a confidential capacity in matters relating to labour relations. Pursuant to section 1(3)(b) of the *Labour Relations Act*, a persons who is so employed is deemed to not be an “employee”. This exclusion enables an employer to better ensure that knowledge of its internal labour relations strategies and communications is restricted to persons whose loyalty is likely to be undivided (*Town of Gananoque*, [1981] OLRB Rep. July 1010, *York University*, [1975] OLRB Dec. 945). A persons involvement in such matters must be more than an occasional or incidental one to justify a finding that s/he is not an employee for purposes of the Act (*Frito Lay Canada Limited*, [1978] OLRB Rep. Sept. 831). Access to information which may be sensitive or confidential in some business or general sense is not, by itself, sufficient to cause an individual to be deemed to not be an “employee”. Similarly, access to personnel information is to be distinguished from access to confidential labour relations information. It is the labour relations content or potential for use in the collective bargaining or grievance resolution of information which is important for purposes of the Board’s considerations in an application under section 106(2) of the Act.

8. The applicant concedes that Ms. Fillman’s duties and responsibilities involved her in confidential matters relating to labour relations. It submits, however, that the “bulk of her time involves non-confidential matters essentially similar to those of other bargaining Unit [sic] employees...”. That is not the point. Nor is it the point that the respondent has other persons who are not in the bargaining unit to whom those of Ms. Fillman’s duties and responsibilities which involve confidential matters relating to labour relations could be transferred. The question is whether Ms.

Fillman is employed in a confidential capacity in matters relating to labour relations such that she should be deemed to not be an "employee" within the meaning of the *Labour Relations Act*.

9. It is clear that not all of Ms. Fillman's duties and responsibilities involve matters relating to labour relations. However, on the basis of the material before the Board, we are satisfied that she is employed in a confidential capacity in matters relating to labour relations. Her duties and responsibilities are such that she is privy to a significant amount of information relating to the respondent's position with respect to potential or unresolved grievances and collective bargaining matters. Dealing with such matters occupies a substantial portion of her time and is an integral part of her job.

10. The Board therefore declares that Jayne Fillman is not an "employee" within the meaning of the *Labour Relations Act*.

2908-89-R; 2909-90-R; 3247-89-R; 3305-89-R Canadian Union of Public Employees, Applicant v. The Ottawa-Carleton French Language School Board (Full Board), The Ottawa-Carleton French Language School Board (Catholic Sector), and The Ottawa-Carleton French Language School Board (Public Sector), Respondent v. Ottawa Board of Education Employee's Union (OBEEU), Intervener #1 v. Service & Commercial Employees Union, Local 272, Intervener #2 v. The Carleton Roman Catholic Separate School Board Employees' Association, Intervener #3; Canadian Union of Public Employees, Applicant v. The Ottawa-Carleton French Language School Board (Full Board), The Ottawa-Carleton French Language School Board (Catholic Sector), and The Ottawa-Carleton French Language School Board (Public Sector), Respondent v. The Carleton Roman Catholic Separate School Board Employees' Association, Intervener #1 v. Ottawa Board of Education Employee's Union (OBEEU), Intervener #2 v. Service and Commercial Employees Union, Local 272, Intervener #3; The Carleton Roman Catholic Separate School Board Employees' Association, Applicant v. The Ottawa-Carleton French Language School Board (Full Board), The Ottawa-Carleton French Language School Board (Catholic Sector), and The Ottawa-Carleton French Language School Board (Public Sector), Respondent v. Service and Commercial Employees Union, Local 272, Intervener; Ottawa Board of Education Employees' Union ("OBEEU"), Applicant v. The Ottawa-Carleton French Language School Board (Full Board), The Ottawa-Carleton French Language School Board (Catholic Sector), and The Ottawa-Carleton French Language School Board (Public Sector), Respondent v. Service & Commercial Employees Union, Local 272, Intervener

Bargaining Rights - Bargaining Unit - Sale of a Business - Bill 109 creating new Ottawa/Carleton French Language School Board out of parts of four predecessor English language school boards - Legislation also deeming intermingling and directing Board to exercise its discretion under subsections 63(6) and (8) of the *Labour Relations Act* as to the appropriate shape of bargaining

rights after the transfer - Shape of maintenance bargaining unit in issue - Board rejecting argument that bargaining rights for maintenance workers should attach to family of schools and not full School Board - Vote results in three other bargaining units disclosed

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members R. M. Sloan and D. A. Patterson.

APPEARANCES: Gilles LeBel, for the Canadian Union of Public Employees; David Migicovsky for the Ottawa Board of Education Employees Union; Alick Ryder & Rachia Van Lierop for the Service & Commercial Employees Union, Local 272; Michael Horan and Gerry Poirier for the Carleton Roman Catholic Separate School Board Employees' Association; Peter Annis and Pierre Léonard for the respondent.

DECISION OF THE BOARD; March 1, 1991

1. These matters relate to a series of applications under section 63 of the Act which result from the 1988 legislation which created the new Ottawa/Carleton French- Language School Board out of parts of four predecessor English-language school boards. In this decision, "the Board" refers to the Labour Relations Board.

The Shape of the Maintenance Bargaining Unit

2. On October 5, 1990, the Board dealt with a question relating to the shape of the appropriate unit of maintenance employees by endorsing the record as follows:

The Board is of the view that it would not be appropriate for bargaining rights for maintenance workers to attach to a family of schools as argued on behalf of SCEU, Local 272. We therefore do not accept Mr. Ryder's proposal as to the appropriate bargaining unit for maintenance workers. Reasons will follow.

We now provide our reasons. We will start with some background which is necessary to understand how this question arises.

3. On June 29, 1988, Bill 109 received Royal Assent and became *An Act to establish a French-language School Board for The Regional Municipality of Ottawa-Carleton* (referred to below for convenience as Bill 109). Up until that time, French language education had been provided in that Municipality by four different school boards, (the "English- language school boards") being The Ottawa Board of Education, The Carleton Board of Education, The Ottawa Roman Catholic Separate School Board and The Carleton Roman Catholic Separate School Board. Four unions held the bargaining rights for various units covered by the multi-faceted successor rights applications now before us. Three of them held rights for maintenance workers: The Ottawa Board of Education Employees Union (OBEEU), The Service and Commercial Employees Union, Local 272 (Local 272) and the Carleton Roman Catholic Separate School Board Employees Association (CRCSSBEA). It is the competing jurisdictions of these three unions that are central to the dispute as to the shape of the maintenance unit.

4. The legislation in section 4(1) and (3) created three heads of collective bargaining jurisdiction within the new school board. These are the public sector, the Roman Catholic sector and the full board. The public sector and Roman Catholic sectors are each made up of members (trustees) elected to the relevant sector. The full board means all of those members. Each of these three heads has exclusive jurisdiction over collective bargaining for its own employees. The functions of those employees are shaped by the lists of jurisdiction in section 4 as well. The portions of these lists relevant to this dispute are as follows:

4.-(1) The following matters are within the exclusive jurisdiction of the public sector in respect of the schools and classes that it governs and within the exclusive jurisdiction of the Roman Catholic sector in respect of the schools and classes that it governs:

• • •

10. Receiving revenue for school purposes, including but not limited to grants and money from municipal levies.

11. Appointing, assigning and removing teachers and other employees in respect of matters within the sector's jurisdiction.

• • •

13. Prescribing the duties of teachers and other employees.

• • •

19. Determining the terms on which teachers and other employees are to be employed and fixing their salaries.

20. Collective bargaining in respect of teachers and other employees.

• • •

24. Providing benefits in respect of employees.

(3) The following matters are within the exclusive jurisdiction of the full board:

• • •

4. Maintaining buildings and premises and furniture and equipment for the French-language Board.

• • •

8. Appointing and removing employees, other than the executive director, in respect of matters within the full board's jurisdiction.

9. Determining the terms on which employees described in paragraph 8 are to be employed, prescribing their duties, fixing their salaries and providing their benefits.

• • •

11. Collective bargaining in respect of its employees.

5. By force of the legislation, the English language school boards started assigning some of their employees to the new Ottawa-Carleton French-language School Board in September, 1989. In stages prescribed by the legislation, their employment relationships were transferred to the new school board, or one of its sectors, as provided in Part VIII of the Act. Setting out these detailed provisions would not add to this decision and we therefore do not propose to do so. The legislation contemplated that there would be matters to be sorted out among the bargaining agents from the predecessor school boards in the new situation. Section 75 of Bill 109 provides as follows:

75.-(1) For the purpose of section 63 of the *Labour Relations Act*, the employees who are not teachers and who are transferred from the English-language boards to the public sector shall be deemed to have been intermingled, and,

(a) The Labour Relations Board may exercise the like powers as it may exer-

cise under subsections 63(6) and (8) of that Act with respect to the sale of a business under that section;

- (b) The public sector has the like rights and obligations as a person to whom a business is sold under that section and who intermingles the employees of one of the person's businesses with those of another of the person's businesses; and
- (c) any trade union or council of trade unions concerned has the like rights and obligations as it would have in the case of the intermingling of employees in two or more businesses under section 63 of that Act.

(2) Subsection (1) applies with necessary modifications in respect of employees transferred to the Roman Catholic sector or to the full board in the same manner as to employees transferred to the public sector.

(3) Sections 69, 70 and 71 prevail over this section in respect of employees described in this section.

(4) Sections 67, 68 and 72 do not apply to employees described in this section after an application is made to the Labour Relations Board under this section.

Sections 69, 70 and 71 provide for the retention of certain privileges with respect to salary and sick leave credits of transferred employees. Sections 67, 68 and 72 provide methods to determine the terms of employment of employees transferred between 1989 and 1991 according to their date of transfer. It also provides a grievance arbitration process for settling disputes during the transitional period, which, by operation of section 75(4), came to an end with the filing of these applications.

Portions of section 63 relevant to this issue are sections 63(3), (6) and (8) of the *Labour Relations Act* which read as follows:

63.- ...

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

...

(6) Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the business with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any

shall be the bargaining agent or agents for the employees in such unit or units; and

- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

• • •

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes as it considers appropriate.

6. Local 272 argued that the Board should, to the greatest extent possible, preserve the status quo, as of the date of the creation of the new school board. This would mean that each of the three bargaining agents who previously held bargaining rights would maintain rights for equivalent bargaining units, and those who were unrepresented by any bargaining agent would remain unrepresented. The other union parties and the employer sought a single unit of maintenance workers and a vote among the various bargaining agents who previously held rights for maintenance workers.

7. Local 272 took the position that the employer was required to bring forth evidence about the transfer of power from the English language Boards to the new school board in order to enable us to inquire into and determine the “like bargaining units” as in the situation before the creation of the new school board. The Board ruled that the obligation on the employer to bring forth evidence contained in section 63(13) of the *Labour Relations Act* as to an allegation that there had been a sale of business did not apply at this juncture of the proceedings. In the matter before us, the legislation creating the new school board has taken the situation beyond an allegation that there was a sale of business. We are not here required to determine whether a sale of a business has taken place. We are instead directed by section 75, set out above, to assume intermingling and to exercise our discretion under section 63(6) and (8) *Labour Relations Act* as to the appropriate shape of bargaining rights after the transfer. On the question of the appropriate bargaining unit or units, there is no statutory burden of proof or obligation to call evidence.

8. Since Local 272 was the only party seeking to call evidence on this portion of the case the Board asked Mr. Ryder to stipulate the facts he wished to prove. The other parties did not dispute these stipulated facts, with the exception of a few matters which were able to be agreed upon after discussion. We then proceeded to argument on this point on the basis of Mr. Ryder’s stipulated facts and the factual additions from the other parties, with which Mr. Ryder was prepared to agree. We will make reference to these facts as necessary below.

9. To put the matter in context, it is necessary to remember that the new school board is the product of parts of the four predecessor English-language school boards. By force of Bill 109, maintenance workers’ employment relationships were transferred to the full board, which has an umbrella-like function with respect to certain administrative functions. The structure sought by Local 272 would involve three separate maintenance bargaining units and a group of unrepresented employees. These groups would be roughly as follows:

1. Maintenance employees employed in schools in the Roman Catholic sector in the County of Carleton, excluding the City of Ottawa. (These were represented by CRCSSBEA in the English-language school boards.)

2. Maintenance employees working in schools in the Roman catholic sector in the city of Ottawa. (These were represented by Local 272.)
3. Maintenance employees working in schools in the public sector in the City of Ottawa. (These were represented by OBEEU.)
4. Maintenance employees working in schools in the public sector in the County of Carleton. (These were, and are, apparently unrepresented by a bargaining agent.)

10. Local 272, whose bargaining rights originated with the Ottawa Roman Catholic Separate School Board, submits that it should continue to represent the employees in the second numbered paragraph above. The members of Local 272's claimed bargaining unit currently work in a "family of schools" in the City of Ottawa. Those twenty-one schools are, under the new school board, the Roman Catholic sector schools in the City of Ottawa. (There are other Roman Catholic sector schools outside the City of Ottawa as well as public sector schools in and outside of Ottawa.) The parties agree that the maintenance staff still report for work to the same schools as they did before the creation of the new school board. Similarly, trades people such as carpenters and plumbers, also represented by Local 272, did and still do, work at all the schools in that family of schools. With the exception of some trades work in emergencies, maintenance staff transferred from other predecessor school boards have not worked in that family of schools.

11. Local 272 has continued to function and represent its members since the creation of the new school board. It has a constitution which provides for elections and enjoys active participation from its members. In the first period of transition to the new structure, between January and September 1, 1989, the collective agreements with the English-language school boards governed the employment relationships and the unions dealt with personnel staff at the English-language school boards. Between September 1, 1989 and March 28, 1990, relations were governed by the existing collective agreements but administered by the new French-language school board. Local 272 dealt with personnel of the full board servicing the Roman Catholic sector of the new school board. Subsequent to the creation of the new school board, Local 272 negotiated a memorandum of agreement dated March 28, 1990 with the new full board which has been implemented. Local 272 has also presented and settled grievances since the inception of the new school board.

12. Section 39(2) of Bill 109 provides that enrolment dictates the proportion of full board expense allocated to one sector or the other. The enrolment breakdown is roughly 75 percent Roman Catholic sector, 25% public sector. There is one payroll service providing services to the sectors as well as to the full board, but three bank accounts. When a cheque is paid to an employee working in a Roman Catholic sector school, that cheque is paid for by allocation to the Roman Catholic sector. All janitors are paid out of the full board account. However, if there is a direct expense attributable to a building in the Roman Catholic sector it pays the entire amount. A tradesman who works only in a Roman Catholic building may be paid for out of Roman Catholic sector funds. Something like plumbing done for the whole system is allocated according to enrolment.

13. Mr. Ryder takes the position that regardless of the provisions of Bill 109, the Roman Catholic sector is the de facto employer of the maintenance workers which Local 272 represents. In this he relies on section 4(1), paragraphs 13, 19, 20 and 24, set out above, while acknowledging the powers of the full board in section 4(3), paragraphs 4, 8, 9 and 11. Dues remittances have been paid by cheque from the Roman Catholic sector. He points to the fact that supervision is done on a sector basis, on the basis of a family of schools. Employment is paid for by sector funds. He could not agree that the full board had control of these employment relationships. Rather he pointed to

section 4(1), paragraphs 13, 19, and 20 which give control to the sectors. He asks the Board to conclude that the control remains with the sectors.

14. The thrust of Local 272's argument is that the previously held bargaining rights are viable, as evidenced by the fact that they have been in place since the creation of the new school board, and thus ought not to be disturbed. Mr. Ryder argues that the purpose of the successor provisions in the *Labour Relations Act* is to preserve bargaining rights, and thus that different considerations pertain than would apply on a certification application. Specifically he argued that section 63(3) directs the Board to look for the "like bargaining unit" in the new situation and to preserve it unless it is not viable. Local 272 submits that the continuation of the three existing bargaining units has worked as a matter of fact and that the best evidence of appropriateness is viability, or its ability to work. He argues that a year and a half of operation in a viable manner is important evidence of appropriateness.

15. As evidence of the continuing viability of the status quo of bargaining rights, Mr. Ryder cites the fact that the new administration was able to agree with the three unions on a process to govern the filling of vacancies with priority given to personnel within a family of schools. Mr. Ryder also points to the almost complete absence of actual intermingling as a factor which supports the preservation of the status quo. As well, there have been no unusual problems in labour relations. Grievances were filed concerning transfers of employees but this is put up to a necessary period of sorting out the "kinks" in Bill 109. Mr. Ryder points to the fact that none of the other parties introduced evidence to say the current structure was unworkable. He characterises the potential problems referred to in argument by the others as worries about the future which should not be acted on by the Board.

16. On the question of fragmentation, Mr. Ryder submits that the overriding question in section 63 is the avoidance of disruption of bargaining units, that we should look for the "like bargaining units" and preserve them if possible. He underlines that the deemed intermingling in section 75 of Bill 109 should not override this main purpose of section 63. He observes that the other parties' proposals about other groups of employees would also create fragmentation.

17. He asserts that since Bill 109 invokes the discretion under section 63 to guide decision making, the legislature intended the previous thinking under section 63 to govern: it is not intended that the successor rights provisions will expand bargaining rights, or to enable the largest group to pick up rights from people who are simply outvoted. As to the deemed intermingling in S. 75 of Bill 109, he asserts that this simply was a legislative direction to use discretion and not a mandatory vote.

18. Local 272 relies on *Oshawa Wholesale Limited*, [1965] OLRB Rep. Feb. 584 for the proposition that where there is only slight intermingling, the board should not alter or amend the existing bargaining rights. Mr. Ryder argues that the reasons for that is best explained by *City of Peterborough*, [1979] OLRB Rep. Feb. 133 where the Board found no intermingling and held that in fashioning or amending units the greatest effect should be given to existing rights to the extent they can be reasonably accommodated within the administrative structure of the employer. In the absence of any evidence of difficulty in accommodating the units, section 63 should operate to give effect to those rights.

19. On behalf of the employer, Mr. Annis submitted that the fact that the school board had made the best of a bad situation in living with the status quo should not be held against it. He argued that if it had ever been suggested that by signing agreements it would prejudice its rights to argue the appropriate shape of bargaining rights, it would not have signed them.

20. Mr. Annis emphasised that the statutory provisions are what must govern. The purpose of the legislation, to establish a new school board, must be kept in mind in interpreting section 75. Employees were to be transferred from four different school boards so that the new school board could start afresh. The purpose of giving the full board certain powers was to promote efficiency. If the full board is obliged to deal with three unions for exactly the same group of employees for whom jurisdiction is clearly with the full board, it would make no labour relations sense. He cites in particular the problem of multiplicity of threats of strike, and restrictions on mobility. He summarised by saying that he simply could not believe that this was the intention of the legislature. He underlines that the employer was required to do what it did during the period of transition from the English language boards. All of that ends with an application under section 63, by force of the legislation. He asserts that the start up period was very difficult, but the legislature provided that it would come to an end. He refers to section 68(2) which reads as follows:

68.

(2) The French-language Board shall not hire a person who is not a transferred employee if there is a transferred employee who is qualified, willing and available to fill the position.

The employer submits that this is evidence of a legislative intent to have mobility rather than restrict it and that Local 272's proposal would be in direct conflict with this legislative intent. The employer argues that the legislation was intended to protect employees in general, not in a narrow way based on historical union rights. Local 272 asks for a bargaining unit on a geographic basis, but there are Roman Catholic and public schools in the same geographic area. Counsel cites an additional inconsistency in applying such a concept to the full board that has jurisdiction in the full geographic area.

21. On behalf of the OBEEU, Mr. Migicovsky argued that there would be no meaning to the deemed intermingling provisions if the Board gave the meaning to the section argued by Local 272. The situations in which the Board has declined to exercise its discretion to order a vote are those in which the size of the two units makes it very clear who the winner is. He asserts that the basis of Local 272's submission, being bargaining rights attached to a family of schools based on where they came from historically, makes no provision for the future. He asks whether new schools will be allocated according to the shape of old bargaining rights.

22. OBEEU suggests that lack of mobility will be a problem if the Board accedes to Mr. Ryder's request; employees will be limited to the handful of schools that they originally came from. School closures will only have meaning in terms of a family of schools. Co-workers hired recently may be able to keep a job just because their school is not closed. He raises the possibility of shared schools, public and Roman Catholic in the same building and asks if the janitors would be divided up on the basis of whether they were cleaning a Roman Catholic or a public washroom. He queries whether Mr. Ryder's proposal prevents the new school board from assigning tradesmen to move about from school to school.

23. On behalf of CRCSSBEA, Mr. Horan submitted that the preservation of existing rights is one of the considerations, but not the paramount one under s. 63. He asserted that the others were at least as important. He asked us to be guided by the labour relations realities which will flow from the design chosen. He argues that in Local 272's design there would be three different unions representing identical employees. He suggested size is also one indication of appropriateness. Above all he submitted that the Board has been very clear that "situs certifications" are not appropriate. The basis suggested by Local 272 is geographical address, an approach long rejected by the Board. He joined with the employer in saying that the status quo for the last two years has been a product of the statutory requirements, and should not be relied on to shape the appropriate

bargaining unit. Where there are three bargaining agents of more or less equal size, then the correct result is a vote. He said none of the stipulated facts derogate from this practice, which the community has come to accept.

24. In reply, Mr. Ryder submitted that Local 272's proposal was not to ignore the deemed intermingling provisions, but not to make them mean something they do not say. If we had no intermingling, we would not have the discretion in section 63(6) and (8) to reshape the bargaining units. However, having the discretion does not mean it should be exercised in the fashion that the other parties ask. He asserts that the other parties are asking the Board to act on events that have not occurred and may never occur. Specifically he says that there is no evidence that mobility was or will be a problem. He submits that if it could occur, one would think it would have occurred in a year and a half. He agrees that more mobility is good, but s. 63 cases never have concerned themselves with that. We should be governed, not only by what is appropriate, but in large measure by the scope of the bargaining rights already in existence. Local 272 maintains that acknowledgement by the employer that it could accommodate the situation when forced to do so by the legislation underlines that it is able to do so in the future as well.

25. It is not necessary for the scope of the issue as to the shape of the maintenance bargaining unit to determine whether the two sectors and the full board are three distinct employers, or should be treated as divisions of one employer as in *Beatrice Foods (Ontario) Limited*, [1982] OLRB Rep. June 815, an option mentioned in *Conseil scolaire de langue française d'Ottawa-Carleton*, [1989] OLRB Rep. June 575. Nor is it necessary to determine at this juncture the exact description of the appropriate bargaining unit. The question raised by Local 272 is resolved much more narrowly.

26. We start with the meaning of the deemed intermingling language in section 75 of Bill 109. Deemed intermingling features in section 63(11) of the successor rights provisions of the *Labour Relations Act* in relation to mergers of municipalities. This section and its predecessors have been the subject of prior Board decisions as to the purpose of deemed intermingling in the general scheme of the *Act*. For example, *Waterloo County Board of Education*, [1969] OLRB Rep. May 287, dealt with the predecessor provision's application to the creation of that school board. The statutory language does not differ in any relevant way to that in section 75 of Bill 109. The Board said as follows at paragraphs 9 to 11:

9. As can be seen from the provisions of section 47(a)(10)(b) [now 63(11)(b)], the legislature has specifically provided that the new or enlarged municipality, in this case the applicant, has the like rights and obligations as a person to whom a business is sold under this section and who intermingles the employees of one of his businesses with those of another of his businesses. Since section 47(a)(10) "deems" that there has been an intermingling of employees of the schools over which the applicant has jurisdiction, it therefore follows that such intermingled employees are indistinguishable for the purpose of collective bargaining. The Board must therefore make its determination in this matter pursuant to the provisions of section 47a(5) and section 47a(7) [now 63(6) and 63(8)] of the *Labour Relations Act*.

10. Under section 47a(5) the Board may, among other things, determine whether the employees concerned constitute one or more appropriate bargaining units. In the absence of this provision, it might be argued that since the employees of a municipality are deemed to be intermingled, office employees and others must accordingly be deemed to be melded with and indistinguishable from the employees with whom we are here concerned. However, since the Board has jurisdiction to determine whether the employees constituted *one or more* appropriate bargaining units, it is open to the Board to follow its usual practice of separating office employees from other employees. *However if we took the position that employees in a certain classification were distinguishable on a geographic basis we would thereby cause the legislative direction, contained in section 47a(10), that the employees are deemed to have been intermingled, to be meaningless.*

11. As stated above, since the employees of the applicant are deemed to have been intermingled for the purpose of section 47a, as far as we are able to see at this time it is our view that we must accept the intermingling of employees as a fact. It also follows, as far as we are able to see at this time, that for collective bargaining purposes, the intermingled employees in a particular classification should not be distinguished on a geographic basis.

[emphasis added]

27. As well, in *The North Bay Board of Education*, [1969] OLRB Rep July 489, the Board, in dealing with a school board maintenance unit in a newly created school board, described section 47a(10) [now s. 63(11)] as “antagonistic, in the better sense of the word, to any instinct to preserve the status quo despite changing circumstances.”

28. We have carefully considered all the authorities to which we were referred and comment on some of them as follows. *City of Peterborough*, [1979] OLRB Rep Feb. 133, referred to by Mr. Ryder, dealt with the reacquisition of a transit system by the City of Peterborough which had been previously operated on a contractual basis by an outside corporation. There was no intermingling, deemed or otherwise, that could trigger the operation of section 55(6) [now 63(6)]. The Board stressed in those circumstances that its consistent point of departure is a recognition that the primary purpose of the section is the preservation of employees’ bargaining rights, as opposed to the same criteria as would apply in a certification application. At paragraph 13 it wrote:

...in the fashioning or amending of bargaining units under section 55 [now section 63] of the Act the Board must give effect to existing bargaining rights to the extent that those rights can be reasonably accommodated within the new employer’s administrative structures.

The Board made reference to the fact that the value of a bargaining unit is enhanced when developed through a succession of collective agreements into a “workable pattern of mutual expectations” saying it was understandably reluctant to dismantle a bargaining structure that has withstood the test of time. It held that where the drivers, mechanics and cleaners employed in the transportation service worked in locations separate from the other employees of the City, with a history of working together and bargaining together, with a separate community of interest from other City employees, there was no reason to believe that the continuation of the bargaining rights would unduly hamper the employer’s operations. This case is readily distinguishable on its facts. The previously unrepresented office workers had become an accretion to the City’s office and clerical unit. The people at issue were the drivers and mechanics previously employed by the transit company. Nothing had changed except the name of their employer. The same cannot be said when the legislature has intervened to completely reorganize the entire employment situation in creating a new body corporate to better carry out its intent of delivering French language education. More importantly perhaps, the Board found there to be a separate community of interest from the other employees of the City. With or without deemed intermingling, such a finding is not open to us on the facts before us. The evidence did not establish a community of interest in the maintenance employees of this family of schools which is different from those in other schools in the Roman Catholic sector or from those in the public sector.

29. In *Oshawa Wholesale Ltd.*, [1965] OLRB Rep. Feb. 584, a company which owned twenty-two grocery stores acquired another company with eight stores. At the time of the hearing only two employees had been intermingled although further intermingling was planned. The Board held that the intermingling was so slight that it should not exercise its discretion to alter or amend the existing bargaining rights. The bargaining rights for the newly acquired stores were simply continued. The Board commented that in a certification application it would probably have found the appropriate bargaining unit to have been all the stores in the metropolitan area, but here just continued previously acquired rights. In other words, in applying the successor rights provisions, the

Board must consider not only what would be an appropriate bargaining unit in a certification proceeding, but also it must take into account, and in large measure be governed by, the scope of the bargaining unit already in existence. This decision did not deal with deemed intermingling and is therefore of limited assistance. Nor does it deal with a completely reorganized employment structure. As well it may usefully be contrasted with the more recent remarks of the Board in *Silverwood Dairies*, [1980] OLRB Rep. Oct. 1526 at paragraph 23 as follows:

The Board has wide powers with respect to determining bargaining units and voting constituencies in cases arising under section 55(6)(d) [now 63(6)(d)] and section 55(8) [now 63(8)]. In exercising those powers, it is desirable that the determination should be, subject to any exceptional circumstances that may exist in particular instances, consistent insofar as possible with the overall practice of the Board with respect to the determination of appropriate units (see *Mammy's Wonder Bakeries*, [1969] OLRB Rep. March 1324).

30. The jurisprudence, read as a whole makes it clear that the Board does take a different approach where there is intermingling, unless it is so slight as not to be acted on as in *Oshawa Wholesale Ltd.*, *supra*. This is structured by the fact that section 63(4) directs the Board to turn its mind to what is the “like” bargaining unit, while section 63(6), which operates once there is intermingling, speaks of the “appropriate” bargaining unit. In intermingling situations where the Board has not ordered a vote it has looked to considerations such as the fact that the original business remained a distinct and identifiable one as in *Hamilton Cargo Transit*, [1983] OLRB Rep. June 887. See also *Simcoe Block*, [1982] OLRB Rep. Jan. 118. Although the schools which Local 272 seeks to continue to represent are still identifiable, they have no status for maintenance distinct from any other schools in either sector. For maintenance purposes, they are now part of the larger “business” of the reorganized school board and thus the facts are not similar to these cases. Furthermore, there has been an actual intermingling of tradesmen for emergency work.

31. In the deemed intermingling situation, it is also useful to refer to *The Corp. of the City of Kitchener*, [1973] June 306. That case dealt with the situation in which various municipalities were amalgamated to form the Corporation of the City of Kitchener, by statute. In considering section 55(11) [now 63(11)], the deemed intermingling section, the Board indicated that a balance must be struck between preserving the bargaining rights held by the intervening trade unions prior to the amalgamations while at the same time determining a bargaining unit or units which are appropriate in the context of the structural organization of the employer. The Board went on to consider the structure in the new organization and whether there was intermingling, actual or planned. For the disputed groups, the Board found three bargaining units to be appropriate - one of all mechanics and service men, one of all gas and water workers and one of bus and trolley drivers. This is a result at odds with that sought by Local 272 in that the bargaining units were organized as to work function regardless of geographic location. For example, mechanics working out of two depots who had formerly been employed by two separate employers became part of the same bargaining unit. The Board cited the fact that the work performed by the mechanics, although at different locations and on different vehicles, was largely the same, and that, although minimal, there had been some interchange of personnel between the two depots.

32. On the basis of the jurisprudence in deemed intermingling situations, then, the amount of actual intermingling is not irrelevant, but it is not the only or the principal factor to be considered. The legislative direction to deem intermingling must be given some meaning. The discretion it triggers is to consider what is appropriate, not merely what is “like” as in section 63(3). Although more than one appropriate bargaining unit is possible, we do not find on the facts before us that a family of schools is the appropriate basis for a bargaining unit. We agree with counsel for Local 272 that a vote is not automatic, but we do not think the facts before us suggest that a vote is inappropriate, or that the prior bargaining units should be preserved in the manner suggested.

33. The issue before us could be dealt with simply on the basis that we are not persuaded that there is reason to depart from the thoughts of the Board expressed in, among others, *Waterloo County Board of Education*, and *The North Bay Board of Education*, *supra*. The scheme urged on us on behalf of Local 272 would do exactly what the Board there warned of: it would endorse the idea that employees in maintenance classifications were distinguishable on the geographic basis of the location of the school to which the employees were originally hired by the English language Boards and would be entirely driven by an attempt to preserve the status quo despite very changed circumstances. It is difficult to see what effect would be given to Bill 109's deemed intermingling in this result.

34. However, the legislature has spoken more clearly here than in cases which fall to be determined under section 63(11) or one of its predecessors alone. There is much more in Bill 109 to guide us about the intended structure of the workplace than just the deemed intermingling language of section 75. Most importantly perhaps, the legislature assigned the function of maintenance to the full board. It had the option to assign it to the individual sectors as it did with so many other things in section 4(1). It chose not to do so. Although it is clear that the two sectors have the right to transfer the matters in their exclusive jurisdiction to the full board (s.4(4)), there is no parallel right for the full board to transfer things in its exclusive jurisdiction to the sectors. The full board is comprised of the two sectors functioning together; it is defined in section 1(1) as all the members of the French-language Board. The legislature made a clear choice to move away from the Roman Catholic/public designation in the matters it assigned to the full board rather than to the sectors. This assumes even more importance in the context of the overriding fact that the legislature departed from the previous division between school boards identified as Roman Catholic or public and moved to a school board identified by its language of instruction.

35. It is also clear that the legislature intended to move away from the municipal boundaries which shaped the predecessor English-language school boards. The Regional Municipality of Ottawa-Carleton is the municipal organizational base for Bill 109. For the English-language school Boards it was the City of Ottawa and the County of Carleton, each of which had a Roman Catholic and public school board.

36. These factors in the legislation indicate that the legislature was moving away from the basic organizing structure underlying the English-language school board for those matters assigned to the full board, among which is maintenance. The legislation ended the structure which provided the parameters of the bargaining unit sought by Local 272. Local 272 wishes to preserve a maintenance bargaining unit of only Roman Catholic schools limited to the City of Ottawa. What remains of it under the new French-language school board is a family of schools in the Roman Catholic sector, not an organizational unit with any relationship to the place assigned maintenance by the new legislation.

37. We are persuaded that the same result should pertain even if one analyses this problem from the point of view urged on us by Local 272 that the Roman Catholic sector is the de facto employer. The structural logic of Bill 109 crosses the old municipal boundaries even within the Roman Catholic sector. The new Board, even if limited to the Roman Catholic sector, looks radically different than the old, and we see the deemed intermingling provisions to be an invitation to take full account of this fact. A family of schools as a basis for collective bargaining rights does not fit with the fact that the Roman Catholic sector is also defined along the boundaries of the Regional Municipality. To base an appropriate unit on a family of schools would be equivalent to creating a partial departmental bargaining unit, something the Board has not traditionally found to be appropriate.

38. The viability of the relationship between Local 272 and the employer during the transitional period must be seen against this legislative backdrop. It is true that there was no extraordinary problem demonstrated in evidence before us. However, it is also clear that this period was marked both by legislative prescription and dealings between the employer and the four unions that would be unusual during the normal currency of a bargaining relationship. No matter how successful, the legislature's intention as expressed throughout Bill 109 was that this situation would be temporary. Attaching bargaining rights to a family of schools in the City of Ottawa would be to perpetuate several aspects of the predecessor situation which the legislature specifically did away with. We did not see this as an appropriate basis of defining the bargaining rights and thus ruled as we did.

The Vote Results

39. Subsequent to our ruling recorded above, the parties settled the remaining issues among them as recorded in the Board's decisions of October 24 and 29. The votes pursuant to these decisions have now been held.

40. There were four bargaining units in which votes were held as follows:

- (1) The office and clerical employees of the Roman Catholic sector.
- (2) The maintenance employees of the full Board.
- (3) The cafeteria employees of the public sector.
- (4) The bus drivers in the Roman Catholic sector.

41. No statement of desire to make representations has been filed with the Board within the time fixed under subsection 1 of section 70 of the Board's Rules of Procedure following the taking of those votes, except with regards to the vote regarding the full Board maintenance unit. The issues raised in representations filed by Local 272 in regards to that vote will be heard by the Board shortly. For the other bargaining units the results are as follows.

42. *Office and Clerical Employees - Roman Catholic Sector:* On the taking of the representation vote directed by the Board on October 24, 1989, more than fifty percent of the ballots cast were cast in favour of the Carleton Roman Catholic Separate School Board Employees Association. Therefore, the Board declares that it is the exclusive bargaining agent for the employees in the office and clerical unit in the Roman Catholic sector, the full description of which is set out in the Board's decision of October 24, 1989.

43. *Cafeteria Employees - Public Sector:* On the taking of the representation vote directed by the Board on October 29, 1989, more than fifty percent of the ballots cast were cast in favour of the Ottawa Board of Education Employees' Union. Therefore the Board declares that it is the exclusive bargaining agent for the cafeteria employees in the public sector. The full description of the bargaining unit is set out in the Board's decision of October 29, 1989.

44. *Bus Drivers - Roman Catholic Sector:* On the taking of the representation vote directed by the Board on October 29, 1989, more than fifty percent of the ballots cast were cast in favour of the Carleton Roman Catholic Separate School Board Employees Association. Therefore the Board declares that it is the exclusive bargaining agent for the unit of bus drivers in the Roman Catholic sector, the full description of which is set out in the Board's decision of October 29, 1989.

2737-90-G International Union of Operating Engineers, Local 793, Applicant v. **PCL Constructors Eastern Inc.**, Respondent v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America Local 527 and Operating Engineers Employers Bargaining Agency and The Metropolitan Toronto Demolition Contractors Inc., Interveners

Adjournment - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Issues raised by grievance raising jurisdictional dispute - Board adjourning consideration of grievance pending filing and disposition of jurisdictional dispute complaint

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. H. Wightman* and *H. Peacock*.

APPEARANCES: *Bertha Greenstein* and *Len Budge* for the applicant; *Jim Thomson* and *Dwight Brown* for the respondent; *John Moszynski* and *Rick Weiss* for Ontario Provincial District Council and Labourers' International Union of North America; *Jim Thomson* for Operating Engineers Employer Bargaining Agency; *S. C. Bernardo* for The Metropolitan Toronto Demolition Contractors Inc.

DECISION OF THE BOARD; March 4, 1991

1. This is a referral to the Board of a grievance in the construction industry, pursuant to the provisions of section 124 of the *Labour Relations Act*.
2. The Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America Local 527 (the "Labourers") have sought to intervene in this proceeding on the basis that they are the bargaining agent of employees who may be affected by the application. The Labourers assert that the essence of the grievance herein is in the nature of a jurisdictional dispute which should proceed as such.
3. We also note that the Labourers intervention asserted that notice of this proceeding should be given to The Metropolitan Toronto Demolition Contractors Inc. and Delsan Demolition Limited ("Delsan"). The Registrar sent such notice by letter dated February 21, 1991.
4. At the hearing on February 27, 1991, counsel for the Labourers advised the Board that he had spoken to representatives of Delsan the previous day with respect to the matter and had been advised that Delsan had not received any notice from the Board with respect to this proceeding. Counsel suggested that, in the circumstances, it would be inappropriate for the Board to proceed in the absence of Delsan. In our view, it was not appropriate for the Labourers to do more than to bring this question to the attention of the Board. It is evident that Delsan, which has offices in Mississauga, did have actual notice of this proceeding and of the hearing on February 27, 1991 by at least February 26, 1991. Delsan could have retained one of the many lawyers who practice law in the Municipality of Metropolitan Toronto or the Regional Municipality of Peel, or sent some other representative to the hearing to make representations on its behalf with respect to any issue herein, including any question of notice. In that respect, we note that the Metropolitan Toronto Demolition Contractors Inc. was able to retain and instruct counsel, who did not request an adjournment, in similar circumstances.
5. We find it unnecessary to repeat the representations of the parties in detail. Suffice it to

say, that the respondent and the interveners requested that the Board either dismiss the grievance herein outright or defer consideration of it pending the disposition of the jurisdictional dispute which they asserted the grievance raised. In addition, the Labourers submitted that the applicant herein s ould be required to file a jurisdictional dispute complaint, although they also undertook to file one. The applicant argued that the respondent and interveners had not established that its grievance raised the jurisdictional dispute, that all it sought was an enforcement of the collective agreement with the respondent, and that this was a case in which the Board should follow the lead of the decisions in *Schindler Elevator Corporation*, [1990] OLRB Rep. Oct. 1092 and *Vic West Steel Limited*, [1991] OLRB Rep. Jan. 111 and not adjourn or defer the section 124 proceeding herein unless and until it was at least determined that there is merit to the grievance.

6. Section 91(1) of the *Labour Relations Act* provides that:

91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

• • •

As the Board observed in *Schindler Elevator Corporation*, *supra*, the Board has, in the interests of labour relations stability, adopted a broad approach to jurisdictional disputes such that, once satisfied that it has the jurisdiction to do so, the Board will generally hear a complaint concerning work assignment on its merits as such. It is not uncommon for a grievance to raise an issue which is essentially or substantially a jurisdictional dispute. When a complaint under section 91 is filed, or is contemplated, with respect to the same assignment of work which is the subject of the grievance which has been referred to it, the Board is faced with deciding how the dispute is best resolved. The purpose of section 124 is to provide an expeditious mechanism for resolving grievances in an industry in which the nature of the work and the structure of labour relations often renders ineffectual the kind of arbitration provisions typically found in collective agreements. On the other hand, section 91 is specifically designed to be the primary means by which jurisdictional disputes are to be resolved. Accordingly, although there may be circumstances in which it is not appropriate to do so, the Board will often defer consideration of a grievance until a (*bona fide*) jurisdictional dispute relating to the same assignment work has been resolved. When faced with that kind of situation, the Board has generally concluded that a grievance can constitute a demand for the work in question (*Eaman Riggs Limited*, [1978] OLRB Rep. March 228, *Napev Construction Ltd.* [1979] OLRB Rep. Sept. 886, *Pre-Con Company (A Division of St. Mary's Cement Limited)*, [1981] OLRB Rep. July 947, *Ontario Hydro*, [1982] OLRB Rep. March 428). A jurisdictional dispute complaint need not be dispositive of a grievance before the Board will defer consideration of the latter. Further, as the Board observed in its January 11, 1991 decision in *Vic West Steel Limited*, *supra*:

3. A recurrent complaint from the labour relations community in recent years has been that jurisdictional disputes take too long and are too expensive to litigate before the Board. The community has complained that this situation has developed because the Board has failed to be sufficiently active in directing the proceedings. The Board has been aware of and [is] sensitive to these concerns. It too has experienced some frustration in that respect. Jurisdictional disputes have come to consume an ever increasing and disproportionate amount of the Board's resources. It has become increasingly apparent that the costs of jurisdictional dispute proceedings, both to the Board and to the parties, often far exceed the value of any benefit derived from them. That situation is rapidly going from bad to worse.

7. In this case, the grievance referred to the Board alleges that the respondent “has engaged non-union personnel and non-union sub-contractor [sic] to perform work covered by the agreement” and requests that the respondent “immediately remove the non-union personnel and equipment, comply with and apply all terms and conditions of the Collective Agreement, monetary and non-monetary, and pay to the union in trust all wages and benefits owing as a result of the [respondent’s] violation of the collective agreement”. Counsel for the applicant conceded that the work which is the subject of the grievance (namely, the operation of shovels, rubber-tired back-hoes and skid steer loaders in the demolition of a commercial structure), was performed by members of the Labourers (it says by members of Labourers International Union of North America Local 506) and that the object of the grievance was to obtain the work for its own members.

8. The Board’s decisions in *Schindler Elevator Corporation, supra*, and *Vic West Steel, supra*, indicate that the Board is concerned about the direction that the jurisdictional dispute process before it has taken. We agree with the comments made in those decisions in that respect. It should be evident that the Board intends to give careful scrutiny to request that a proceeding be deferred or adjourned pending the disposition of a jurisdictional dispute. A party making such a request must satisfy the Board both that the matters in issue in a proceeding do raise a jurisdictional dispute *and* that it is appropriate for them to be determined under section 91 of the Act using the Board’s jurisdictional dispute procedure before a section 124 referral, for example, is allowed to proceed. This does not mean that it will be the Board’s general practice to either defer or not to defer to the jurisdictional dispute process. Each case merits individual consideration in that respect.

9. In *Vic West Steel, supra*, what led the Board to proceed with the section 124 referral before the jurisdictional dispute complaint which had been filed was an assertion that the trade union which had delivered the grievance and referred it to the Board, and which grievance was accepted by all concerned to constitute a demand for the work in question, did not hold the bargaining rights upon which the grievance could be based. If, as the respondent employer asserted in that case, the applicant trade union held no relevant bargaining rights, its grievance would be dismissed, and, there being no other demand for the work in question, there would be no jurisdictional dispute within the meaning of section 91 of the Act. The Board went on to note that:

7. Of course, if its grievance fails, Local 1256 could itself file a complaint under section 91 which, if it proceeded, would raise the same work assignment dispute as the present complaint. However, a very significant difference would be that the issue of Local 1256’s bargaining rights would have been determined as between the parties. It is true that the existence of bargaining rights is but one factor which the Board considers in determining jurisdictional disputes. However, a review of the Board’s jurisprudence makes it readily apparent that it is a very significant factor where one of the trade unions involved holds relevant bargaining rights and the other does not. Consequently, a determination of the bargaining rights question is very likely to put the jurisdictional dispute into different perspective, whichever way it is determined, but particularly if Local 1256 is found to not hold any relevant bargaining rights. Consequently, resolving this issue before proceeding with a jurisdictional dispute may well reduce the costs of any jurisdictional dispute proceeding both to the Board (and therefore the taxpayer) and the parties.

10. Similarly, the *Schindler Elevator Corporation, supra*, decision must be read in the context of the circumstances set out therein. It is evident that the Board in that case was concerned about the conduct of the grieving trade union and whether there was any *prima facie* merit to the grievance in light of that conduct.

11. Consequently, while we agree with the decisions in *Schindler Elevator Corporation, supra*, and *Vic West Steel, supra*, we were not persuaded that it is appropriate to proceed with this application without first providing an opportunity to file a jurisdictional dispute complaint.

12. In this case, no one suggested that the applicant does not hold the bargaining rights upon which its grievance is based. Nor was there anything before the Board which raised the kinds of concerns raised in *Schindler Elevator Corporation, supra*. Further, the grievance herein is a *prima facie* demand for work which it was assigned by the respondent to and performed by members of the Labourers. It appeared to us that the nature of the issues raised by the grievance and the various interests involved are such that the issues raised by the grievance raise a jurisdictional dispute and are best dealt with under section 91 of the Act through the Board's jurisdictional dispute procedure.

13. We therefore ruled, orally, that consideration of the grievance herein should be deferred pending the filing and disposition of a jurisdictional dispute complaint. We did not find it appropriate to direct the applicant to file a jurisdictional dispute (assuming we have the power to so direct). However, we noted the Labourers undertaking to do so.

14. In the result, this proceeding was adjourned for twenty-one days (from February 27, 1991). If within that twenty-one days a jurisdictional dispute is filed with respect to the subject matter of the grievance herein, this matter will be adjourned *sine die* pending the disposition of that jurisdictional dispute. If no such jurisdictional dispute complaint is filed, the application herein will proceed.

15. As we noted in our ruling, we thought it premature to make any comment concerning the relationship, if any, between this grievance and the proceedings in Board File Nos. 1031-89-G or 1321-89-JD.

2227-90-FC United Steelworkers of America, Applicant v. Placer Dome Inc., Respondent

First Contract Arbitration - Parties - Practice and Procedure - Employer, federal and provincial governments, and certain Indian Bands entering into "Dona Lake Agreement" prior to union's certification - Agreement establishing, *inter alia*, employment guarantees and training opportunities for native workers as well as dispute settlement mechanism - Employer taking position in bargaining that terms and conditions for native workers determined by "Dona Lake Agreement" - Employer refusing to recognize union's bargaining authority within meaning of section 40a(2)(a) of the Act - Board also exercising discretion under section 40a(2)(d) of the Act - First contract arbitration directed - Board denying Indian Bands standing to intervene in section 40a proceeding without prejudice to their right (if any) to make submission to arbitrator

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members W. A. Correll and B. L. Armstrong.

APPEARANCES: Brian Shell for the applicant; Bruce Binning and Mark Contini for the respondent; David Hunter and David Miller for the Band Council.

DECISION OF THE BOARD; March 26, 1991

I

1. This is an application under section 40a of the *Labour Relations Act*. That section reads, in part, as follows:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

(3) Where a direction is given under subsection (2), the first collective agreement between the parties shall be settled by a board of arbitration unless within seven days of the giving of the direction the parties notify the Board that they have agreed that the Board arbitrate the settlement.

The union contends that bargaining for a first collective agreement with the respondent has been unsuccessful for reasons that warrant a direction that the dispute be resolved by arbitration.

2. This application was filed on November 23, 1990, and was originally scheduled to come on for hearing before the Board on December 18, 1990; however, the parties agreed to waive the time limits in section 40a and adjourn the matter, without prejudice, so that they could make further efforts to settle their collective bargaining differences without litigation or third party intervention. Those bargaining efforts were unsuccessful, and the case continued on February 18, 1990.

3. At the opening of the hearing on February 18, certain Indian Bands sought standing to intervene and make representations in opposition to the union's arbitration request. Counsel for those Bands indicated that he had learned of the proceeding only a few days before, and that if standing were granted, he would be requesting an adjournment to take instructions and prepare submissions. Since several Indian Bands were involved, counsel was unable to say how long this consultation process would require.

4. Counsel conceded that he did not directly represent any employee in the bargaining unit, nor had any native worker authorized him to speak on his/her behalf; however, counsel contended that there was a "Band interest" in this proceeding, because some of the company's employees were native Indians, and the Bands had a 1987 agreement ("the Dona Lake Agreement") with the employer concerning employment opportunities for native Indians. Counsel contended that the Dona Lake Agreement should take precedence over any collective bargaining process mandated by the *Labour Relations Act*, any collective agreement which might be negotiated by the applicant union on the employees' behalf, and any term or condition of employment which an arbitrator might determine pursuant to section 40a(4) of the Act. In counsel's submission, the

possibility that a collective agreement might affect the implementation of the Dona Lake Agreement gave the Bands standing to intervene.

5. The nature of the “Indian employment interest” established by the Dona Lake Agreement will be examined in more detail below. At this stage it is sufficient to note that the Board dismissed the Bands’ request for standing to intervene, without prejudice to their right (if any), to make submissions to an arbitrator should the Board decide that that is the way the collective bargaining dispute should be settled.

6. It is evident from the language of section 40a that the Indian Bands are not a “party” within the meaning of section 40a itself. They are not an employer or trade union. They do not participate in the bilateral bargaining or statutory conciliation process which must precede a section 40a application, and which usually results in a collective agreement without recourse to section 40a. They do not participate in the selection or payment of the arbitrators should that process be engaged. They will not be either parties to, or bound by any collective agreement which results from arbitration, should that be the manner in which a first agreement is settled, just as they would not have been bound if the union and employer had settled the agreement between themselves. But most important, the access to arbitration inquiry undertaken by the Board under section 40a(2) will not produce any collective agreement and will neither prescribe nor affect the terms or conditions of employment of any native worker. All that the Board will decide is whether the collective agreement will be settled by arbitration, or by further bilateral negotiations between the union and the employer; and, in the meantime, if a direction to arbitration is made, section 40a(15) will preserve the *status quo* (compare section 79 of the Act). Thus, even if the Indian Bands have some derivative interest based upon an agreement with the company respecting work opportunities for native employees, our acceptance or rejection of the union’s arbitration request would not affect that interest.

7. For completeness we should note that counsel for the Federal Crown was present in the hearing room “on a watching brief”, and was invited to address the Board. He indicated that he did not seek to intervene or make submissions. Similarly, a solicitor for the Native Affairs Secretariat of the Ministry of the Attorney General was present and invited to make representations. He supported the Bands’ request for standing, but did not otherwise seek to intervene.

II

8. In accordance with Practice Notes 18 and 19, both parties filed extensive documentary material in support of their respective positions, together with written representations on the application of section 40a. This documentary material consisted, for the most part, of bargaining proposals and related correspondence which, it was said, would illuminate the bargaining process in the months preceding this application. On the agreement of the parties, the Board also received the respondent’s minutes of some of the bargaining sessions, however, the parties agreed that these minutes would be filed “only to give the Board a sense of the exchange which took place, and not for their accuracy or completeness”. Neither party sought to call oral evidence about what was said or done at the bargaining table, or about the practical or tactical considerations behind the various bargaining positions which were taken from time to time. The parties agreed that neither of them would “assert or request that the Board draw any adverse inference from the failure of any party to call *viva voce* evidence about any matters in this application”, and, of course, all of the bargaining after November 23, 1990, was covered by their “without prejudice” stipulation. The parties were content that the Board make its own judgements about the quality and content of the bargaining, based solely on the written material before it.

9. The case proceeded on this basis, and in view of the parties’ agreements, counsel were

able to substantially shorten what might otherwise have been a long and complicated hearing. On the other hand, the Board has been left to assess the intrinsic "reasonableness" of the parties' bargaining positions having regard only to the itemized positions themselves, and the stage of bargaining that the parties had reached when this application was filed. We have not found that to be an easy task where, as here, the union chose to abandon the bargaining table for the Board before there had been detailed discussion on economic issues (see *infra* paragraphs 18-21), and the two and a half months of bargaining between November 23 and February 18 is not before us.

III

10. The respondent is a mining company. In the mid-1980's it decided to develop a gold mine on a property near Pickle Lake in the District of Kenora. That mine is located in the vicinity of *but not on* lands reserved to several Indian Bands. For this reason, among others, the local Indian communities were keenly interested in the respondent's proposed development.

11. In order to facilitate the timely development of the mine, it was necessary for the company to respond to concerns which had been raised by local Indian Bands under the *Environmental Protection Act*. An assessment under that Act would have resulted in significant delay and cost, even if the project were eventually permitted to proceed. To avoid those consequences, the company engaged in a process of negotiation with local groups which culminated in the Dona Lake Agreement.

12. The parties to the Dona Lake Agreement are: Dome Exploration (Canada) Limited, the Osnaburgh Indian Band, the Windigo Tribal Council, the Government of Canada as represented by the Minister of Indian Affairs and Northern Development, and the Government of Ontario as represented by the Minister of Northern Development and Mines, and the Attorney General. Among the terms of the Dona Lake Agreement are a variety of employment guarantees and training opportunities for native workers. At the time this agreement was concluded, of course, the work force had yet to be assembled.

13. In consideration of these guarantees (among other things) the Bands agreed to withdraw their request to have the project "designated" for assessment under the *Environmental Protection Act*. With that hurdle overcome, the project proceeded. By the end of 1989, the mine employed approximately seventy-two workers, of whom about eighteen were native Indians.

14. On November 3, 1989, the United Steelworkers of America applied for certification as the bargaining agent for a bargaining unit of the company's employees described as follows:

"all employees of Placer Dome Inc. at its Dona Lake Mine in the Township of Pickle Lake, save and except forepersons, persons above the rank of foreperson, office, clerical, technical and sales staff, and students employed during the school vacation period".

In order to obtain certification the union had to demonstrate that it enjoyed the membership support of a majority of the workers in the bargaining unit. That is what the union did. On November 27, 1989 the Board found that more than fifty-five per cent of the employees in the bargaining unit were union members and certified the union as the employees' bargaining agent.

15. The respondent employer did not oppose this application for certification or demand a hearing. No employee sought to intervene or file a statement in opposition. The Indian Bands did not intervene either. In this respect, then, this certification application was no different from hundreds of others which come before the Board each year, as groups of employees develop an interest in collective bargaining, and decide, by a majority, to designate a trade union to represent them.

16. Following certification, the union gave notice to bargain and both parties began the process of negotiating a first collective agreement. The details of that process are set out in the indexed binders filed with the parties' pleadings, and need not be reviewed here. It suffices to say that the bargaining involved a number of meetings over many months and, in the result, made very little progress.

17. It is obvious from the record that at various times one party or the other took positions that contributed to the ultimate impasse; however, chief among these was the union's continuing refusal to deal with any monetary issues until all contract language matters had been settled. Sooner or later collective bargaining always involves concessions and "tradeoffs", but the union was unwilling to give the company an early opportunity to "buy off" union demands which would limit the company's discretion to organize and direct the work force. The company responded that all elements of the collective agreement had a "cost", and that, accordingly, no complete replies could be prepared until the company was fully apprised of the union's economic demands.

18. However common this bargaining strategy may be, and whatever its utility in first agreement situations, the result in this case was that prior to November 1990 there was little fruitful discussion on important issues, and even less agreement. The union did not table a full monetary proposal until the end of October 1990 - eleven months after the union's certification, and only a few weeks before the instant application; moreover, until the union revealed its wage position, there was little productive bargaining on "economic" matters. And without the pressure of an imminent strike or lock-out, neither party was forced to seriously order its priorities, and decide which objectives should be advanced or abandoned in this their first round of bargaining. Both parties were able to keep a few "traders" on the table, to be given up later in return for movement somewhere else.

19. The bargaining was also hampered by the geographic isolation of the worksite, communications difficulties between the union representative in Thunder Bay and the employer representatives in Vancouver, weather problems, and a willingness by bargainers on both sides to cancel or postpone meetings to accommodate the others' schedules. No doubt a spirit of cooperation is an important ingredient facilitating the bargaining process, but, in this case, it seems to have led to more negotiations Fax to Fax than face to face. If the minutes of the meetings submitted accurately record the amount of time actually spent in face to face bargaining, the evidence for the period prior to October 1990 is: not very much. There was little movement or dynamism to the bargaining process until the end of November 1990 when the company retained its present counsel.

20. By early November 1990, very little had actually been agreed upon, but the parties had finally exchanged fairly complete positions on all matters in dispute. The union complains that, at this point, the company failed to "walk it through" a particularly important proposal presented on November 14. In the union's submission, the company's untimely departure to catch an airplane is indicative of its attitude throughout the bargaining process, and falls within the ambit of section 40a(2)(c) of the Act.

21. We do not agree. On the day in question, the company indicated that it was prepared to respond to the union's initial impressions and answer any immediate questions. The company also indicated that it would consider any written inquiries made by the union between November 14 and November 26 - 28 which had already been set aside to continue the bargaining. The short meeting on November 14 cannot be considered in isolation from the three days already scheduled to continue negotiations. Those dates were cancelled at the instance of the union, because the union chose instead to file this application.

22. The union points to a number of bargaining positions which were singled out as either

particular irritants in the bargaining process, or indicative of a dilatory and destructive bargaining stance on the respondent's part. However, having considered the matters to which we were referred, both individually and in combination, it is not at all obvious to us that they either meet the test of section 40a(2)(b) or (c), or that they are the reason that collective bargaining was ultimately unsuccessful. We do not think an employer is obliged to justify why it will not accede to the union's position, merely that it has a reasonable justification for its own; nor should the Board confuse its role under 40a(2) with that of an interest arbitrator under section 40a. A *bargaining position* may have a "reasonable justification" whether or not an arbitrator would ultimately accept it for inclusion in a collective agreement; moreover, an employer makes a pretty good beginning when it can show that its proposal is within the range accepted in broadly similar circumstances (i.e. in bargaining which *has* been "successful"). The Board must also consider the dynamics of bargaining, the stage that bargaining had reached, and the intrinsic importance of any issue(s) said to be the "sticking point(s)", before concluding that bargaining has been unsuccessful, and that the reason for failure falls within the ambit of 40a(2)(a)-(c).

23. We do not think it is necessary to review the various positions of which the union complains. Section 40a requires the Board to carefully scrutinize any bargaining process which extends, unsuccessfully, as long as this one has, and, at the very least, casts an onus of explanation on any respondent insisting on something unusual; moreover, the abstract invocation of "management rights" may not be sufficient justification for intransigence on matters not obviously central to an employer's ability to run the business efficiently. Where, as here, the bargaining process has taken so many months with so little agreement, the Board is entitled to take a forensic approach, and carefully examine the positions that the parties have taken as well as the way they have gone about the business of bargaining. Having said that however, if it were necessary to make any final determination on these issues in this case, it is not at all clear to us that the circumstances, evolution, and stage of the bargaining establish the prerequisites for a section 40a direction - especially since it appears that the bargaining after November made considerable progress once all of the issues were on the table. Indeed, were it not for the "Dona Lake issue" the Board might not have been inclined to make a section 40a direction at all.

24. But the Dona Lake Agreement was raised early in the bargaining process, its relationship to the collective agreement was never satisfactorily resolved, and as time went on, this uncertainty became a serious impediment to progress at the bargaining table. The company was reluctant to take any bargaining position which either was, or might be seen to be inconsistent with the Dona Lake Agreement; while the union's frustration mounted at what it considered to be a refusal to recognize its right to bargain on behalf of a significant number of employees in the bargaining unit. The union sought to negotiate positive benefits and grievance procedures for the employees it represents, including native workers. The company raised the spectre of conflict and misunderstanding if the union were drawn into an established framework where only band leaders and governments were consulted about native employment interests. The union was as jealous of its legal prerogatives as the employer was of its management rights, and just as the employer did not welcome the prospect of having its decisions reviewed by an arbitrator, the union did not welcome the possibility of other parties intruding in the employer-employee or collective bargaining relationship. Nor was this a groundless fear, as the requested intervention in this proceeding amply demonstrates. And from the union's perspective, it was not at all clear that the rather general provisions and "consultation" process in the Dona Lake Agreement compared favourably with the familiar, specific, and enforceable employee protections contained in a typical collective agreement. On the contrary, if native workers were *limited* to the "benefits" in the Dona Lake Agreement, the union feared that they might be left with only a limited right to challenge management decisions that adversely affected them.

25. In order to appreciate the potential for friction with the Dona Lake Agreement, it may be useful to briefly review some of its terms and their possible impact on employees in the bargaining unit represented by the union. We will not attempt to review the Agreement in its totality, but will focus only on a few examples.

IV

26. As we have already mentioned, the Dona Lake Agreement is a multi-party arrangement intended to promote local community development and employment opportunities for native workers. Among its core provisions is a hiring target of thirty native employees, together with related undertakings in respect of training and apprenticeship. The Agreement contemplates special work schedules and leaves of absence to allow native employees to participate in traditional economic activities (hunting, trapping, fishing, and ricing). But these arrangements are neither clear “rights” nor guarantees. They are privileges to be extended, withheld or qualified by the company, in consultation with a committee consisting of representatives of the company, the Indian Bands, and the two governments. The individual worker and his/her union (not being parties to the Dona Lake Agreement) have no direct role, or immediate right of redress should there be a dispute about such entitlements.

27. The Dona Lake Agreement contemplates the possibility of a “labour pool whose membership exceeds the number of jobs filled by it... such jobs to be filled through reasonable and flexible scheduling...”. Although merely a possibility, this kind of communal work-sharing scheme, if implemented, would obviously bear upon the work opportunities of existing bargaining unit employees, if only to share the jobs on an equitable basis. And as before, the implementation of such scheme depends upon the initiative and consent of the company and the other parties to the Dona Lake Agreement, not the trade union and the workers directly involved.

28. The notion of “management rights”, and the possibility of employee discharges are recognized in these terms:

“It is understood that, subject to *reasonable* grievance procedures to ensure that decisions on workplace discipline and termination of employment operate *fairly*, Dome retains reasonable management rights to discipline or dismiss employees who are not performing efficiently and competently in their employment position”.

There are no standards of “reasonableness” or “fairness” spelled out in the Dona Lake Agreement, nor is it clear whether or how an aggrieved worker could challenge this management decision. It is arguable, however, that s/he might be able to refer her/his complaint to one or other of the consultative committees provided in the Agreement, and might be *obliged* to pursue this route if the Dona Lake Agreement superseded a collective agreement. To take a simple example: an employee alleging unjust discharge or improper lay-off might lose the right to speedy independent arbitral review - one of the most common but critical benefits of a collective agreement (and one contemplated by section 45 of the Act) - in favour of a multi-party consultative process with its own dynamic, and in which neither the union nor the worker have a direct right to participate. Such process might not even be “quasi-judicial” or recognize collateral employee interests of the kind which arbitrators must consider following *Re Bradley and Ottawa Professional Fire Fighters Assoc.* [1967] 2 O.R. 311 (C.A.).

29. In addition to work guarantees and preferential hiring practices, the Dona Lake Agreement contemplates a variety of committees struck for particular purposes and involved in both consultation and implementation of the principles set out in the Agreement. The Sub-Agreement on Human Resource Development Needs includes this provision for the resolution of disputes:

Dispute Resolution

- 14(1) The Dona Lake Working Committee, as established by The Dona Lake Agreement shall, resolve all disputes which concern matters dealt with in this Sub-Agreement and, subject to s.14(2), shall alone have the power to decide whether it has authority over a dispute.
- 14(2) The Coordinating Management Committee shall, resolve all disputes unresolved within 30 days by or appealed from the Dona Lake Working Committee and shall alone have the power to decide whether it has authority over a dispute.
- 14(3) The Parties hereto agree that the procedures outlined in this section shall be exhausted before recourse is had to any other decision-making forum.

It is not clear how this procedure might interact with the arbitration procedure required by statute (see section 44(1)) and available to the union if there is a dispute concerning the interpretation, application, administration or alleged violation of the collective agreement.

30. It is important not to overstate the difficulties, or be diverted by hypotheticals and possibilities. Most of the provisions in the Dona Lake Agreement involve access to work opportunities, training programs or other affirmative action initiatives for native workers which are neither obviously or even likely to be in conflict with the process of collective bargaining or the objectives which the union itself has sought to achieve on behalf of native members of the bargaining unit. Indeed, we are inclined to think that if the union and the Indian Bands were to engage in dialogue, they would discover large areas of common interest, and, that, in turn might help resolve some of the company's concerns about being "caught in the middle". In practical terms, there may not be an operating incompatibility between the collective agreement and the Dona Lake arrangements, since the union itself supports "affirmative action". For example, the union has proposed its own "native equity plan" which would be included in the collective agreement and therefore readily enforceable at the instance of an aggrieved employee or the trade union pursuant to sections 44 or 45 of the *Labour Relations Act*. That native equity plan reads as follows:

Art. XX. Native Employees' Employment Equity Plan

- XX.01 The objective of the Native Employees' Employment Equity Plan is to relieve hardship or economic disadvantage among native employees and to assist native employees to achieve equal opportunity in the workplace in accordance with s.13(1) of the Human Rights Code by providing native employees with the benefits described herein.
- .02 Where the rights of native employees pursuant to this article conflict with rights of non-native employees under other provisions of this collective agreement, the rights of native employees pursuant to this article shall prevail.
- .03 In all cases of vacancy, promotion, transfer, layoff and recall from layoff, native employees shall be entitled to preference if they have the ability and physical fitness to perform the work, notwithstanding their seniority.
- .04(a) Upon request of any native employee, the employer shall grant to him/her leaves of absence which total not more than three months in a calendar year, for the purpose of engaging in traditional economic activities.
- (b) A native employee shall continue to earn seniority during any leave granted for the purpose of engaging in traditional economic activities which leave shall be for the period set forth in the Dona Lake Native Agreement and the Dona Lake Human Resources Sub-Agreement on the one hand, or for the period set forth in Article XX.04(a) on the other hand, whichever provides the greater benefit to the native employee.

.05 In order to facilitate access to upgrading programs by native employees, the employer agrees to:

- 1) provide physical facilities and necessary equipment at the minesite which can be used for the viewing of high school upgrading television/video programs, such as the "WAHSA" program; and
- 2) upon the request of any native employee, schedule him/her to work at such times as will permit such native employees to view high school upgrading television/video programs.

.06 The employer agrees that in disciplining or discharging a native employee, it shall have regard to the social, cultural and economic factors affecting native employee in determining whether it has just cause to discipline or discharge the native employee and in fashioning the appropriate remedy, if any.

Art. XXI. Transportation

.01 The employer shall provide round trip transportation for native employees from Osnaburgh and Pickle Lake to the minesite at the beginning of every shift and from the minesite to Osnaburgh and Pickle Lake at the end of every shift.

In the union's submission, proposals such as this one give concrete contractual expression to the sometimes general or undefined principles in the Dona Lake Agreement, without raising any conflict with that Agreement. However, these proposals do involve an active role for the union in asserting or protecting the rights of the native workers it represents, and because the union believes that those rights are best protected in a collective agreement it is reluctant to defer to the Dona Lake arrangements in which it plays no part. And, of course, from the union's point of view, the question of "who speaks for workers" on employment issues, has been settled by its certification as their bargaining agent.

31. The problem from the company's point of view is that for commercial reasons it has bound itself to an agreement which at least potentially impinges upon the employment rights of native workers, while at the same time it is obliged by law to bargain with the union its employees have chosen to represent them. This dilemma was raised quite early in the bargaining process and was addressed in a letter to the union dated March 23, 1990:

RE: COLLECTIVE AGREEMENT NEGOTIATIONS AND DONA LAKE INDIAN AGREEMENT

As we advised during the negotiations for a collective agreement, the Company was awaiting advice from its counsel regarding appropriate procedures and respective responsibilities, regarding the application of the Dona Lake Indian Agreement to the collective bargaining process.

We have now been advised that the difficulty raised by our situation is the potential conflict which could exist between a negotiated collective agreement with different terms from those contained in the Dona Lake Indian Agreement. Neither the *Labour Relations Act* of Ontario nor the Common Law presently states that the collective agreement is to override the existing Indian Agreement.

Dona Lake is a signatory (along with four (4) other parties), entered into a valid contractual obligation on signing the Indian Agreement, and as such, must continue to do everything it can to honour its commitments to that contract. The Company is unable (nor authorized) to seek to alter the terms of the Dona Lake Indian Agreement when negotiating with the Steelworkers. Similarly, the Steelworkers are not authorized to act as agents of any of the parties to the Dona Lake Indian Agreement.

To this end, Dona Lake must take the position that it is legally and morally bound to ensure that

the Indian employees in the bargaining unit continue to be provided with the benefits guaranteed under the Dona Lake Agreement.

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The company did not want to be in a position where the Band representatives demanded a course of action under the Dona Lake Agreement inconsistent with the negotiated terms of employment, or the Bands asserted the primacy of the Dona Lake dispute settlement procedures over the arbitration process provided in the employees' collective agreement. The company wanted to avoid competing claims to legitimacy or debates about who must be consulted about, or spoke on behalf of, native employment interests. That prospect prompted the company to demand significant alterations to the recognition clause that the company itself had originally proposed for inclusion in the parties' collective agreement.

32. On March 8, 1990, early in the bargaining, the company proposed a recognition clause framed as follows:

ARTICLE 1.

RECOGNITION

- 1.01 The Company hereby recognizes the Union as the exclusive representative of employees in the following designated unit, to wit:

All employees of the Company at it's [sic] Dona Lake Mine in the Township of Pickle Lake, save and except forepersons, persons above the rank of foreperson, office, clerical, technical and sales staff and students employed during the *school vacation period*, all as set forth in the certificate issued by the Ontario Labour Relations Board on November 27, 1989.

Such recognition is accorded for the purposes of collective bargaining with respect to wages, hours and other terms and conditions of employment subject to and in accordance with the provisions of the Ontario Labour Relations Act.

That clause basically mirrors the bargaining unit definition found in the OLRB certificate of November 1989. By taking this bargaining position, the employer was being consistent with both established bargaining practice and section 41 of the *Labour Relations Act*, which provides that:

41.-(1) Every collective agreement shall be deemed to provide that the trade union that is a party thereto is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein.

It is almost universal that in bargaining for a first collective agreement the bargaining parties will simply "pick up", without debate, the terms of the Board's certificate, moreover the Board has found it to be illegal to insist on anything else, or to bargain a recognition issue to impasse. By November 1990, however, the company was insisting upon these additions:

ARTICLE 1.

RECOGNITION

- 1.01 The Company hereby recognizes the Union as the exclusive representative of employees in the following designated unit, to wit:

All employees of the Company at it's [sic] Dona Lake Mine in the Township of Pickle Lake, save and except forepersons, persons above the rank of foreperson, office, clerical, technical and sales staff and students employed

during the *school vacation period*, all as set forth in the certificate issued by the Ontario Labour Relations Board on November 27, 1989.

Such recognition is accorded for the purposes of collective bargaining with respect to wages, hours and other terms and conditions of employment subject to and in accordance with the provisions of the Ontario Labour Relations Act.

- 1.02 The Union acknowledges that the Company is bound to an Agreement with the Osnaburgh Indian Band, the Windigo Tribal Council, the Government of Canada and the Government of Ontario, ("the Native Indian Agreement") which requires the Company to provide certain benefits, guarantees and preferences to Native Indians employed by the Company.
- 1.03 The Company and the Union agree that the Native Indian Agreement shall not form a part of this collective agreement for any purpose. Without restricting the generality of the foregoing, it is understood and agreed that any alleged violation of the terms of the Native Indian Agreement will not be subject to the grievance and arbitration procedures provided for herein.
- 1.04 The Company and the Union agree that it shall not constitute a violation of this collective agreement for benefits or other preferences not provided for in this Agreement to be accorded to Native Indians employed by the Company in the bargaining unit.

And in January 1991, the document labelled "Final and Last Offer", contains these recognition provisions:

- 1.05 The Company and the Union agree that it shall not constitute a violation of this Collective Agreement for benefits or other preferences not provided to all employees in the bargaining unit to be accorded to Native Indians employed by the Company in the bargaining unit pursuant to the terms of the Native Indian Agreement.
- 1.06 Where the rights of Native Indian employees as defined by the terms of the Native Indian Agreement or as determined by any dispute resolution procedure provided for in the Native Indian Agreement conflict with the terms of this Collective Agreement, it is agreed that the rights of Native Indian employees as defined by the Native Indian Agreement or as determined by any dispute resolution procedure provided for in the Native Indian Agreement shall prevail.

[This document was put before the Board on the agreement of the parties, but, as we have mentioned above, there was no direct evidence on the bargaining in the preceding weeks.]

33. The record does not disclose any response to the union's proposals respecting native workers. Those proposals were described in argument before us, merely as "unacceptable" without further elaboration or explanation. But the explanation is obvious (and no other was suggested in evidence). The company felt obliged to take the position that the terms and conditions for native workers - potentially some forty per cent of the bargaining unit - had already been determined by the Dona Lake Agreement or would be prescribed by that Agreement in accordance with the consultative process or dispute settlement mechanisms defined therein. There was a group of bargaining unit employees "carved out" by Dona Lake whose employment rights had already been (at least partially) defined; and the company was not prepared to consider any deviation from Dona Lake, even if the union proposal was more advantageous to native workers, and even if Dona Lake alone might leave them with fewer protections in some areas than non-native workers. In the circumstances, it is difficult to resist the union's characterization of the situation: the company could not or would not bargain with the employees' bargaining agent about these matters because they had already been settled by a previous arrangement with the Indian Bands and governments. That, the union contends, is a refusal to recognize the bargaining authority of the union within the

meaning of section 40a(2)(a) of the *Labour Relations Act*. In order to avoid an allegation that it has broken faith with the spokesmen for the native communities, the company has refused to recognize the comprehensive role which the union is entitled to play as the workers' designated representative under the *Labour Relations Act*.

34. The union submits that this is also an appropriate case for an exercise of the Board's discretion under section 40a(2)(d). The union points to this observation in *Juvenile Detention (Niagara) Inc.*, [1987] OLRB Rep. Jan. 66:

"Indeed, on its face, section 40a(2)(d) could be construed as a rather extraordinary invitation from the Legislature to "break the log jam" even when the respondent's conduct does not amount to bad faith bargaining, or otherwise does not fit squarely into items (a) - (c)."

The union submits that, in the instant case, there is a "ghost at the bargaining table", impeding the negotiations and preventing a serious consideration of its bargaining proposals. The union contends that however laudable the objectives of the Dona Lake Agreement may be, the company has used it to confine, inhibit, and ultimately frustrate the bargaining process provided under the *Labour Relations Act*. The company cannot recognize the union's bargaining authority in respect of native workers because it has already settled their rights, and undertaken to recognize someone else.

35. The employer replies that the Dona Lake Agreement represents a desirable balance of commercial and social objectives (hence the government signatories) which the company is entitled to promote and protect in its collective bargaining with the applicant union.

V

36. This case raises, in a novel context, both the employer's obligation to recognize the employees' bargaining agent, and the extent of its duty to bargain about their terms and conditions of employment, when, for understandable commercial reasons, the employer seeks to maintain the situation as it was before the employees brought the union on the scene. It involves an unusual interplay of legal, commercial, community and collective bargaining interests; and, accordingly, it may be useful to briefly outline the scheme of collective bargaining law established by the *Labour Relations Act*.

VI

37. The nature and social utility of collective bargaining have been succinctly summarized by Professor Weiler, in a short passage to which we might usefully refer:

"To its proponents, collective bargaining is a mode of employee representation which serves two vital social functions. It secures for workers a measure of *protection* from the employer and the vicissitudes of the labour market -- protection from substandard wages and benefits and from arbitrary and unfair treatment on the job. In addition, such protection is secured through a process which affords workers themselves a considerable measure of *participation* in the entire endeavour -- in their initial choice of a union, the election of their union officers, the formation of their bargaining agenda, the decision about whether to accept a contractual proposal or to go on strike, and the settlement or arbitration of grievances during the life of the contract. From the point of view of employers, while labour law does reconstruct the background market by enabling workers to pool their bargaining resources so as to exert greater leverage *vis-a-vis* the firm, the law does not dictate from the outside across-the-board substantive solutions to workplace problems. Instead, the parties in each individual relationship are directed to sit down together to devise their own voluntary responses to their particular concerns, through measures which can be specially tailored to their individual needs and priorities, and which they can revise or discard as their situation changes".

In Professor Weiler's view, collective bargaining gives workers a form of "empowerment" and a measure of industrial democracy:

"Collective bargaining is not simply an instrument for pursuing external ends, whether these be mundane monetary gains or the erection of a private rule of law to protect the dignity of the worker in the face of managerial authority. Rather, collective bargaining is intrinsically valuable as an experience in self-government. It is the mode in which employees participate in setting the terms and conditions of employment, rather than simply accepting what their employer chooses to give them (which, if the employer happens to be benevolent, may be just as generous compensation, just as restrained supervision). If one believes, as I do, that self-determination and self-discipline are inherently worthwhile, indeed, that they are a mark of a truly human community, then it is difficult to see how the law can be neutral about whether that type of economic democracy is to emerge at the workplace".

38. Collective bargaining is a process which the law of Ontario not only permits, but encourages. The Preamble to the *Labour Relations Act* provides:

WHEREAS it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

Section 3 of the Act guarantees that:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

Sections 64, 66 and 70 protect workers who seek to engage in collective bargaining, and prohibit employer interference with their right to do so. For example, section 66(b) of the Act provides:

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; ...

An employer is not entitled to insist in a contract of employment, or as a condition of employment, that workers forego their statutory rights; and, *a fortiori*, it is not entitled to do so merely to preserve a commercial advantage or maintain consistency with some pre-existing arrangements with third parties.

39. The Act envisages the formation of trade unions as the vehicle through which employees, acting together, can advance or protect their interests, and a trade union can be "certified" as the employees' bargaining agent when the majority of those employees demonstrate that this is their wish. Similarly, a union may lose its agency status if a majority of employees indicate that they no longer wish to be represented, or wish to be represented by someone else. However, as long as the union is entitled to represent the employees in a bargaining unit, it must do so in a manner that is neither arbitrary, discriminatory, or in bad faith (see section 68); and, more important for present purposes, the employer is compelled to recognize the union and must refrain from bargaining with anyone else. Section 67 of the Act reads as follows:

67.-(1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargaining with or enter into a collective agreement with any

person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

40. Once the trade union has been certified, the union and employer are obliged to meet and bargain in good faith, and make every reasonable effort to make a collective agreement (section 15). That process involves considerable latitude and flexibility, as is suggested by the definition of "collective agreement" itself (see section 1(1)(e) of the Act); however, subject to section 40a of the Act, to which we will return later, certification does not, in itself, prescribe the terms of the collective agreement, or even guarantee that there will be one. As Professor Weiler has noted:

"... Certification does give the trade union a license to bargain for the unit. It imposes a corresponding obligation on the employer to sit down at the table with the union and make a sincere effort to reach agreement about terms and conditions of employment. But the law does not, as it cannot, tell the employer that it must settle the contract on the union's terms, any more than the employer can oblige the union to agree to the employer's terms. A system of *free* collective bargaining means that the law, through its agencies such as the labour board, has no right to evaluate the proposals made by either side or to tell them what concessions they must make. If the parties are truly free to agree, they must also be legally entitled to disagree. The assumption of our system is that when they do reach such an impasse, an economic test of strength must take place to break the logjam. It is the strike that determines which side will find it more painful to disagree, which party will be forced to make the major moves toward compromise".

The right to strike also enjoys legal protection, and is an important inducement to compromise. (See generally: P. Weiler; *Reconcilable Differences*, Carswell 1980 pp. 49-56.)

41. Although the Act does not generally stipulate the content of the collective agreement, there are two important exceptions. We have already noted one of them. Section 41 of the Act requires the employer to recognize, in the agreement, the continuing status of the union as the employees' exclusive bargaining agent. In addition, section 44(1) of the Act prescribes the way in which employer-employee disputes must be resolved during the life of that collective agreement:

44.-(1) Every collective agreement shall provide for the final and finding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) If a collective agreement does not contain such a provision as is mentioned in subsection (1), it shall be deemed to contain the following provision:

Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the first party's appointee to an arbitration board. The recipient of the notice shall within five days inform the other party of the name of its appointee to the arbitration board. The two appointees so selected shall, within five days of the appointment of the second of them, appoint a third person who shall be the chairman. If the recipient of the notice fails to appoint an arbitrator, or if the two appointees fail to agree upon a chairman within the time limited, the appointment shall be made by the Minister of Labour for Ontario upon the request of either party. The arbitration board shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it. The decision of a majority is the decision of the arbitration board, but if there is not majority the decision of the chairman governs.

(3) If, in the opinion of the Board, any part of the arbitration provision, including the method of

appointment of the arbitrator or arbitration board, is inadequate, or if the provision set out in subsection (2) is alleged by either party to be unsuitable, the Board may, on the request of either party, modify the provision so long as it conforms with subsection (1), but, until so modified, the arbitration provision in the collective agreement or in subsection (2), as the case may be, applies.

The parties cannot “contract out” of this mandatory dispute settlement process, nor even reserve a right to strike/lock-out about matters not covered by the collective agreement.

42. With these exceptions however, the law does not, by and large, prescribe the actual terms of the collective agreement. But it does oblige the employer to recognize the trade union; it does require the employer to bargain about the terms and conditions of employment, and it does prohibit the employer from bargaining with anyone else, including individual employees. And once the collective agreement is entered into, it is that document which governs - not some notional individual contract of employment, whatever its origin. In *Syndicat Catholique des Employés de Magasin v Paquet Ltée* 59 CLLC ¶15409, Judson J. observed:

“The Union is, by virtue of its incorporation under the *Professional Syndicates' Act* and its certification under the *Labour Relations Act*, the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations. *When this collective agreement was made, it then became the duty of the employer to modify his contracts of employment in accordance with its terms so far as the inclusion of those terms is authorized by the governing statutes.* The terms of employment are defined for all employees, and whether or not they are members of the Union, they are identical for all. ...”

[emphasis added]

Laskin C.J.C. expressed the same view in *McGavin Toastmaster Limited v. Ainscough et al*, (1976) 1 S.C.R. 719:

“The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto. To quote again from the reasons of Judson J. in the *Paquet* case, at p. 214:

If the relation between employee and union were that of mandator and mandatory, the result would be that a collective agreement would be the equivalent of a bundle of individual contracts between employer and employee negotiated by the union as agent for the employees. This seems to me to be a complete misapprehension of the nature of the juridical relation involved in the collective agreement. The union contracts not as agent or mandatory but as an independent contracting party and the contract it makes with the employer binds the employer to regulate his master and servant relations according to the agreed terms”.

In a collective bargaining regime, it is the collective agreement which defines and limits employee rights.

43. We have sketched in this statutory background in order to underline the dilemma which the company faced at the bargaining table. So long as it could unilaterally *dictate* the terms and conditions of employment, prospective workers had to “take it or leave it” and the company could

specify in advance precisely what the workers' employment rights would be; moreover, it could also change those rights, unilaterally, in accordance with any commercial or other concerns which it chose to act upon. The employer was able to impose employment conditions consistent with its undertakings under the Dona Lake Agreement, and employees were obliged to either accept those conditions or seek work elsewhere. However, once the employees had opted for collective bargaining, the employer was obliged to take into account a new reality - one in which it might be required to *modify* its employees' terms and conditions of employment in accordance with *their* demands or priorities as expressed through their trade union.

44. Therein lies the root of the employer's predicament: it had undertaken to conduct its employee relations in a particular way, including reference to various outside interests, but following certification it was required to take into account the collective demands of its employees and their bargaining agent - neither of whom are recognized under the Dona Lake Agreement. And, quite apart from the "legality" of the Dona Lake Agreement, or its "primacy" over the terms of the collective agreement, both the local community and the trade union had legitimate interests which they sought to assert, together with a measure of economic power to back their demands. Of course, it is neither necessary or inevitable that the community interests reflected in the Dona Lake Agreement will clash with the collective bargaining interests of the employees and their trade union, but from the employer's perspective it is now caught in the middle and may be subjected to economic pressures, whichever way it moves.

45. The Board is aware of the barriers and inequities which native Indians have faced in the employment sphere, and the fact that traditional union values (the importance accorded to "seniority" for example) may hinder, or be seen to clash, with the advancement of minority employment interests. That is why this union in this collective agreement, acknowledges the primacy of native rights (see proposed Article XX.02 above), and is probably demanding a greater priority for native employment interests over commercial concerns than the Dona Lake Agreement does. Indeed, as the Board observed at the hearing, both the employee and community organizations are, from their own perspective and by their own means, attempting to advance the interests of native workers. Conflict is by no means inevitable, but accommodations may be difficult to reach when collective bargaining involves a bilateral process in which there is no direct input from the local Indian community, and the multilateral arrangements embodied in the Dona Lake Agreement have no place for the trade union which the employees have selected to represent them.

46. However, our focus is collective bargaining, and the legal principles we are obliged to apply are those in the *Labour Relations Act*. From that perspective, the crux of this case involves a matter of recognition, and it is not without significance that the key elements remaining in dispute and the major impediments to further collective bargaining are the limitations in the employer's proposed recognition clause. The company's bargaining stance and rigid adherence to this position effectively forecloses any meaningful bargaining about the employment conditions of workers who make up a significant portion of the bargaining unit. The company cannot or will not consider such proposals, on their merits, lest it be said that it is reneging on previous undertakings or rejecting the terms and/or dispute settlement procedures in the Dona Lake Agreement in favour of those proposed by the employees' bargaining agent or prescribed by statute. In our view, this bargaining stance amounts to a refusal to recognize the union's bargaining authority within the meaning of section 40a(2)(a) of the Act. This is, in essence, a form of recognition dispute which, in our legislative scheme, cannot be the subject of mandatory collective bargaining or resolved through resort to strike action.

47. In addition, it is our view that the array of third party, community, and government interests evident in this case so overshadows, burdens, and impedes the bilateral bargaining pro-

cess envisaged by the *Labour Relations Act* that it constitutes the kind of circumstance which would warrant the exercise of our *discretion* under section 40a(2)(d). These externalities put the collective bargaining process in a strait-jacket and mire the bargaining parties in a web of conflicting claims from which they are unlikely to be able to extricate themselves through any of the normal collective bargaining processes, including the use of economic sanctions. In our view, this is not a case of the kind described by Professor Weiler above, where resort to raw bargaining power either should, or is likely to, result in successful collective bargaining and a sensible compromise. In these unique circumstances, the bargaining process has been frustrated, and it is appropriate for the Board to step in to "break the log jam".

48. For these reasons, the application is granted, and the Board directs the settlement of a first contract by arbitration.

49. The attention of the parties is directed to section 40a(3) of the Act.

0515-90-R; 2297-90-U; 2298-90-U; 2467-90-G; 2555-90-G; 3072-89-G International Brotherhood of Painters and Allied Trades, Local 200, Applicant v. **Preston & Lieff Glass Limited**, Preston & Lieff Glass Contracts Inc., Preston & Lieff Glass (1988) Limited, Preston & Lieff Door Ltd., Respondents; International Brotherhood of Painters and Allied Trades, Local 200, Complainant v. Preston & Lieff Glass Limited, Preston & Lieff Glass Contracts Inc., Preston & Lieff Glass (1988) Limited, Respondents; International Brotherhood of Painters and Allied Trades, Local 200, Complainant v. Preston & Lieff Glass Limited, Preston & Lieff Glass Contracts Inc., Preston & Lieff Glass (1988) Limited, Respondents; International Brotherhood of Painters and Allied Trades, Local 200, Applicant v. Preston & Lieff Glass Limited, Preston & Lieff Glass Contracts Inc., Preston & Lieff Glass (1988) Limited, Preston & Lieff Door Ltd., Respondents; International Brotherhood of Painters and Allied Trades, Local 200, Ottawa, Applicant v. Preston & Lieff Glass Ltd., Respondent; International Brotherhood of Painters and Allied Trades, Local 200, Applicant v. Preston & Lieff Glass Ltd., Respondent

Construction Industry - Construction Industry Grievance - Lock-Out - Related Employer - Remedies - Sale of a Business - Unfair Labour Practice - Board issuing single employer declaration and directing respondent companies to apply full terms and conditions of applicable collective agreements - Board allowing grievances and awarding compensation - Board issuing cease and desist order and directing reinstatement of union members with compensation

BEFORE: Inge M. Stamp, Vice-Chair, and Board Members D. A. MacDonald and H. Kobryn.

APPEARANCES: S.B.D. Wahl, R. Tier and G. Caroline for the applicant/complainant; no one appearing for the respondents.

DECISION OF THE BOARD; March 19, 1991

1. These are a series of related matters. On the day scheduled for hearing no-one

appeared on behalf of the respondents. The Board waited its customary half hour until 10:00 a.m. before proceeding with these matters. The Board's hearing notices clearly state:

"IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS."

2. The applicant requests a declaration that the respondents are a single employer for the purposes of the *Labour Relations Act* and/or successor employer bound to the collective agreements between it and the respondents. The applicant requests a declaration that the respondents have violated those collective agreements since February 1990.

3. Preston & Lieff Glass Limited became bound by the collective agreement with Local 200 in the mid-60's covering various areas of the glazing business including installation, service and maintenance. Prior to 1978 one collective agreement covered all construction work, maintenance work and the shop fabrication facilities. As a result of legislated changes in 1978 the collective agreement was replaced by two agreements. Industrial, commercial and institutional work came under the ICI agreement pursuant to the designation. The remaining work including the shop, service and residential work was covered by a separate agreement. The business of Preston & Lieff Glass Limited was the fabrication, glazing of windows and doors for construction industry installation including glass curtain wall construction. The applicant and the respondents have had a long term bargaining relationship. The applicant has held bargaining rights for the respondents' employees for more than twenty years.

4. Although the respondents chose not to appear at the hearing, in their reply to the section 1(4)/63 application the respondents make the following submissions:

1. Preston & Lieff Glass Limited is a non active company which has been dormant since on or about the month of June, 1988.
2. At or about the same time that Preston & Lieff Glass Limited became dormant, Preston & Lieff Glass Contracts Inc. and Preston & Lieff Glass (1988) Limited began, in substance, its operations, such operations being a continuation of the business previously engaged in by Preston & Lieff Glass Limited. Preston & Lieff Glass Contracts Inc. engaged in various areas of the glazing business and principally pursued jobs in the industrial commercial and institutional sector of the construction industry. Preston & Lieff Glass (1988) Limited engaged in servicing, retailing, wholesaling and small contractual undertakings in the glazing business in several sectors of the construction industry.
3. The officers, shareholders and directors of Preston & Lieff Glass Contracts Inc. include Ted McGregor and Bernard Lieff.
4. The officers and directors of Preston & Lieff Glass (1988) Limited include Bernard Lieff and Ted McGregor. The shareholder of this company is Bernard Lieff.
5. As Preston & Lieff Glass Limited was at all material times bound to the collective agreements referred to in the application herein, and as Preston & Lieff Glass Contracts Inc. and Preston & Lieff Glass (1988) Limited have continued to carry on the business previously engaged in by Preston & Lieff Glass Limited, Preston & Lieff Glass Contracts Inc. and Preston & Lieff Glass (1988) Limited voluntarily agreed to be bound to the said collective agreements and have at all times complied with the terms, conditions and provisions of the said collective agreements.
6. On or about the month of September, 1988 Preston & Lieff Door Ltd. was incorporated. This company was incorporated to engage in the remanufacturing of hollow doors and metal products including the installation thereof in addition to supplying

and installing miscellaneous products such as hardware, loading docks and overhead doors and other products. The directors and officers of Preston & Lieff Door Ltd. include Robert Bourgeau, Ted McGregor and Bernard Lieff. The shareholders of this company are Ted McGregor and Door Northern Eastern Limited.

7. Preston & Lieff Door Ltd. has since June 18, 1990 been in receivership.
8. Preston & Lieff Glass Limited, Preston & Lieff Glass Contracts Inc. and Preston & Lieff Glass (1988) Limited, hereinafter referred to as Preston & Lieff Glass, and Preston & Lieff Door Ltd., hereinafter referred to as Preston & Lieff Door, deny that any sale of a business has transpired within the meaning of Section 63 of the Labour Relations Act and further deny that they are involved in the operation of associated or related businesses or activities under common direction and control within the meaning of Subsection (4) of Section 1 of the said Act.
9. Preston & Lieff Glass and Preston & Lieff Door operate separate and distinct businesses in premises unrelated to each other. The head office of Preston & Lieff Door is situated at 40 Jamie Avenue in the City of Nepean. The head office of Preston & Lieff Glass is located at 877 Carling Avenue in the City of Ottawa.
10. Preston & Lieff Door have at all material times been under the management and daily operational control and direction of Robert Bourgeau. Neither Bernard Lieff nor Ted McGregor either directed or controlled the business operations of Preston & Lieff Door.
11. Preston & Lieff Glass has been managed by and has been under the daily operational control of Ted McGregor and Bernard Lieff until very recently. In or about the month of May, 1990 Ted McGregor ceased his involvement in Preston & Lieff Glass. Bob Bourgeau at no time has been involved in the direction and control of Preston & Lieff Glass.
12. Preston & Lieff Door and Preston & Lieff Glass carry on and engage in separate businesses. There is no intermingling of employees. Preston & Lieff Glass employs glaziers and metal mechanics whereas Preston & Lieff Door employs persons skilled in the carpenter and sheet metal trades.
13. Preston & Lieff Glass specifically deny the allegations contained in paragraphs e), f), g) and h) contained in Schedule "A" of the application herein.
14. Preston & Lieff Glass specifically deny that Preston & Lieff Door is a successor employer to Preston & Lieff Glass Limited in addition to specifically denying the allegations contained in paragraphs 6, 7, 8 and 10 of the application herein.
15. Preston & Lieff Glass states that in the event that the Ontario Labour Relations Board determines that Subsection (4) of Section 1 of the Act is applicable, which is not admitted but is specifically denied, then and in such event Preston & Lieff Glass requests this Board to exercise its discretion and not make the declaration pursuant to Section 1 (4) of the Act especially in this situation where it is clear that the applicant is attempting by this application to extend its bargaining rights rather than to preserve existing bargaining rights.

5. The evidence establishes that Preston & Lieff Door Ltd. (hereinafter referred to as the "Door Company") was engaged as a glazier contractor at the Carleton University project during February of 1990. The project involved installation of windows in an addition at Carleton University. A grievance was filed, Board File 3072-89-G, to which the respondents replied that the work at Carleton was performed by the Door Company and not Preston & Lieff Glass. The applicant then applied under section 1(4)/63 naming all four companies. Mr. Tessier gave evidence on behalf of the applicant. Mr. Tessier is the treasurer of Local 200 and has ten years experience in the glazing trade. He observed the work performed at Carleton University and knew the subcontractor.

The Door Company was the glazing contractor who subbed the work to Mr. V. Trudell. Based on his experience and the observations on the jobsite Mr. Tessier estimates there was two months' work for four men at forty hours per week.

6. In July of 1990 the activities of Preston & Lieff Glass Contracts Inc., the ICI field installation company, appear to have been terminated and all members of Local 200 working for that company were discharged or laid off.

7. Shop work, non ICI work and maintenance activities continued with Preston & Lieff Glass (1988) Limited. However the Company no longer filed the remittances as required by the collective agreement. The failure to remit became the subject of a grievance in Board File 2038-90-G. There was a decision of the Board (differently constituted) declaring the collective agreements were binding and that the respondent violated the collective agreements and ordering payment of damages. Remittances from July to October 1990 had not been paid as of the hearing.

8. The applicant was informed that all of its members were terminated or discharged from Preston & Lieff Glass (1988) Limited on November 14, 1990. This resulted in further grievances, a section 89 and a lock out application.

9. An article in the Ottawa Citizen on November 24, 1990 made reference to the Preston & Lieff Glass Group of companies quoting Mr. Robert Bourgeau as spokesperson. Mr. Tier, the union representative received reports that work covered by the collective agreement continues to be performed by the Door Company by persons who are not members of Local 200 or referred through the hiring hall as required under the union security provisions of both agreements. No call for men was received by Local 200 and no men were dispatched. At all material times qualified glaziers mechanics and apprentices were available for work on the "out of work" list.

10. A further grievance was filed with respect to the failure to remit under the collective agreement for the month of November which was due December 5, 1990. During the course of that grievance the union received from Mr. Bourgeau documents from Preston & Lieff Glass (1988) Limited showing what remittances are owed for the employees.

11. Mr. Tier was given business cards for the Preston & Lieff Group of Companies and the Door Company. The same company logo is on both cards. The Door Company card indicates the address at 40 Jamie Avenue in Nepean and R.L. (Bob) Bourgeau, President. The Preston & Lieff Group of Companies card indicates the address at 877 Carling Avenue, Ottawa and Edward McGregor, Managing Director. The articles of incorporation for Preston & Lieff Door Ltd. dated September 2, 1988 show the address of the "Registered or Head Office" as 877 Carling Avenue, Ottawa. On the same document the Directors' names and residence addresses are shown. Robert Bourgeau is listed as a Director and his residence shown as 40 Jamie Avenue, Nepean.

12. Mr. Tier approached Ted McGregor when he learned of the existence of the Door Company and asked Mr. McGregor on March 21, 1989 to sign a voluntary recognition binding that entity in addition to the other three companies (hereinafter referred to as Preston & Lieff Glass or the Glass Companies) to the collective agreements. The union was told by Mr. McGregor to speak to Mr. Bourgeau. Mr. Tier, Mr. Tessier and Mr. Bourgeau met on March 30, 1989 at the office of the Door Company. The applicant was advised their business involved hollow metal frame doors, windows and overhead doors. The respondent declined to sign any agreements stating they would not be doing work covered by the Painters jurisdiction. The applicant first became aware of the Door Company doing glazing work covered by its collective agreements, on the Carleton project in February of 1990.

13. On June 26, 1990 Deloitte & Touche Inc. advised the applicant as follows:

Dear Sir:

Re: Preston & Lieff Door Ltd.

We are in receipt of your application under Section 63 of the Labour Relations Act dated June 15, 1990.

Please be advised that the above named debtor corporation has been placed in receivership by a secured creditor and that Deloitte & Touche Inc. have been named as Receiver and Manager.

As Receiver and Manager we are attempting to sell the business assets pursuant to a Sale by Tender dated June 20, 1990. The tender opening will be on June 27, 1990.

Should you have any further questions please contact the undersigned.

Yours very truly,

DELOITTE & TOUCHE INC.

Per:

"Michael K. Carson"
Michael K. Carson, C.A.
Senior Vice President

14. On December 7, 1990 further correspondence from Deloitte & Touche Inc. advised the applicant:

Dear Sirs:

Re: Preston & Lieff Glass (1988) Limited & Lieff Glass Contracts Inc.

We acknowledge receipt of your letter dated November 28, 1990, addressed to the above companies, and to Preston & Lieff Door (1990) Limited and Preston & Lieff Glass Limited.

Please be advised that the above companies are in receivership. Deloitte & Touche Inc. was appointed Receiver and Manager on November 14, 1990 by a secured creditor.

The Receiver and Manager is not operating the business presently and therefore has not been in a position to hire any of the shop employees.

If you have any questions, please contact the undersigned or Paul A. Stehelin.

Your very truly,

DELOITTE & TOUCHE INC.

In its capacity as Receiver
and Manager of Preston & Lieff
Glass (1988) Limited and
Preston & Lieff Glass Contracts
Inc. and not in its personal capacity.

Per:

"Jervis C. Rodrigues"
Jervis C. Rodrigues, C.A.

15. Gabriel Azzie testified that he started to work for Preston & Lieff Glass Limited in 1964 and continued to work for the Preston & Lieff Glass Group of companies until November 14,

1990. Mr. Azzie is a qualified glazier and metal mechanic. He was promoted to shop foreman in 1983. The Glass Companies were located at 877 Carling Avenue, Ottawa. In July 1990 The Door Company moved in and maintained a warehouse area at the back of the Carling Avenue premises. There was a common receptionist. The Door Company used the same bank as the Glass Companies. Paycheques issued by Preston & Lief Door (1990) Ltd. to Gabriel Azzie show the address as 877 Carling Avenue, Ottawa.

16. Bob Bourgeau, President of Preston & Lief Door Limited can be reached at the same telephone number as the Preston & Lief Group of companies, at 877 Carling Avenue, at 725-1151. Customers of the Door Company come to the front office of the Glass Companies and are directed to Bob Bourgeau's office.

17. Employees of the Door Company were performing bargaining unit work on the Glass Companies' premises. Paycheques for September and October were signed by Bernard Lief. Cheques issued on November 14 were signed by Robert Bourgeau for Preston & Lief Glass (1988) Limited.

18. On November 14, 1990 Bob Bourgeau asked Mr. Azzie to see the Deloitte & Touche receiver, Jervis Rodrigues. Mr. Azzie understood from Mr. Rodrigues discussion that he would be working for the receiver for a couple of weeks until the receiver sees which way he is going to go.

19. All the employees of Preston & Lief Glass Company are laid-off on November 14, 1990. Mr. Azzie estimated based on the orders received at the time that there was another two months worth of work for the laid-off employees.

20. On November 16, 1990 Mr. Bourgeau asked Mr. Azzie if he wanted to stay and work "without the union". Mr. Bourgeau asked Mr. Azzie to call all the employees to come in on Monday morning. Mr. Bourgeau then told Mr. Azzie to send the men home if they did not want to work non-union. Mr. Azzie advised Mr. Bourgeau he could convey this message to the men himself and that he, Azzie, would continue to work for the receiver. Mr. Azzie was paid union wage rates while working for the receiver but no contributions were made to the benefit plans nor were union dues deducted and remitted.

21. Employees of the Door Company performed service work covered by the collective agreement. In the past service calls and orders from the front counter were passed on to Mr. Azzie. On November 15 and 16 Joe Young on instructions of Mr. Bourgeau assigned the service work to employees of the Door Company who are non-union.

22. Mr. Azzie was shocked to find his paycheque for November was issued by Preston & Lief Door (1990) Ltd. Mr. Azzie expected to be paid by the receiver. The person looking after the books for the different companies works for Mr. Bourgeau. Mr. Azzie was told that the Door Company was now paying the employees and that the receiver did not want to hire anyone from the union. No payments were made to the various union benefit funds and no union dues were deducted. The print-out of the Ministry of Consumer and Commercial Relations micro fiche does not show a corporation by the name of Preston & Lief Door (1990) Ltd.

23. There was a shipment of glass for the Bank of Canada. However, there is no direct evidence on what happened to it.

24. On November 22 the answering service for Preston & Lief Glass forwarded three emergency calls to Mr. Azzie. Mr. Azzie did the service calls and gave the information to Joe Young in the morning. Mr. Bourgeau requested that they be invoiced by the Door company.

25. On the 10th of January Mr. Azzie was visiting the shop and observed three persons from the Door company carrying sheet glass, putting it on the table and cutting it for a customer waiting at the front counter. This was work that was done by the Glass Companies and is bargaining unit work.

26. Mr. Guy Deschesne had been with the company since 1981 doing shop work, field work and emergency calls. Mr. Bourgeau called everyone in on the 14th at 4:00 o'clock. He said this company is going into receivership and everyone is laid-off. The next day Mr. Bourgeau called Mr. Deschesne and asked him to work for him non-union for more money and higher pension plan. Guy Deschene refused. Mr. Bourgeau again asked Mr. Deschesne to work non-union in January 1991. Mr. Bourgeau asked Mr. Deschesne "even if I don't buy the Company - Preston & Lief Glass (1988) Ltd., and start my own shop under another name, would you work for me?"

27. It is the applicant's position that when work is channelled away from the unionized entity, damages are appropriate and the work and employment be restored to Preston & Lief Glass as in *Plaza Fibreglass Manufacturing Limited*, [1990] OLRB Rep. Feb. 192. The applicant submits Mr. Bourgeau is the operating mind in all of the entities, and he was responsible for channelling the work away from the organized entity. Mr. Bourgeau approached each of the laid-off employees and offered them work provided they agreed to work non-union.

28. As of January 9, 1991 a search of the personal property security registration system in respect of equipment and vehicles shows the owner as Preston & Lief Door Ltd.

29. The applicant is requesting an order and declaration that the named respondents are a single employer for the purposes of the *Labour Relations Act* and are bound as a single employer to the collective agreements.

30. The applicant further requests an order and declaration that Preston & Lief Door Ltd. is a successor employer to the Glass Companies. The respondent in its reply acknowledged that three of the companies are under common direction and control. The applicant submits all corporations are jointly and severally liable for the damages with regard to the remittances in Exhibit 5 and with respect to the grievance in Board File 2555-90-G.

31. With respect to the Carleton University project, File No. 3072-89-G, the respondents have failed to observe the full terms and conditions of the collective agreement, and damages should be awarded as set out in the summary provided to the Board.

32. The applicant submits with respect to the section 89 complaint in Board File 2298-90-U, the circumstances clearly substantiate that the employer locked out the employees, a cessation of employment motivated by anti-union animus. Bob Bourgeau, fired all the union members and told them they could all come back to work for the Door Company if they agree to work non-union. The evidence shows that the Door Company was prepared to pay union or higher rates and therefore, the applicant submits the only conclusion to be drawn is that there is anti-union animus involved. It need only be a factor and not the entire motivation to bring it in line with *Plaza Fibreglass*, (*supra*) see page 192. The applicant submits its appropriate in the circumstances to declare that the employer has engaged in an unlawful lock out of all the employees covered by the collective agreement. Work was channelled away from the Glass Companies in order to defeat the bargaining rights of the union.

33. Accordingly, an order of damages should issue with respect to the work at hand as per the evidence of Mr. Azzie for eight weeks work for all the employees locked out, for work performed by non-union persons in the employ of the Door Company contrary to the collective agree-

ment. This is an appropriate remedy under section 93 as an unlawful lock-out and appropriate under the section 89 as a refusal to employ and continue to employ under section 66 and an attempt to impose a condition of employment under section 66. It is a violation of section 64 to interfere in the representation of employees by a trade union.

34. The applicant takes the position that each of the subsections of section 64 have been violated by imposing a condition of employment that employees be non-union and by refusing to employ or continue to employ them because they are members of the union. The respondents wanted the workers to work for them. They think they are good workers but they don't want them to be unionized.

35. In line with *Plaza Fibreglass*, (*supra*) and *Board of Education of Windsor*, [1984] OLRB Rep. Aug. 1145, the applicant submits the orders requested in its section 89 complaint are appropriate. These are:

- (a) An Order that the Respondents cease and desist from interfering with the administration of a trade union, namely, the Complainant or the representation of employees by a trade union, namely the Complainant;
 - (b) an Order that the Respondents cease and desist from refusing to employ or to continue to employ the Grievors because they are members of a trade union, namely, the Complainants and participate in its lawful activities;
 - (c) an Order that the Respondents cease and desist from seeking by threat of dismissal or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel the Grievors to refrain from becoming, to refrain from continuing to be or to cease to be a member of a trade union, namely, the Complainant and participating in its lawful activities;
 - (d) an Order that the Respondents cease and desist from imposing any condition in a contract of employment or proposing the imposition of any condition in a contract of employment which seeks to restrain the Grievors from exercising their rights under the Act, including joining a trade union of their choice, namely, the Complainant, and participating in its lawful activities;
 - (e) an Order that the Respondents cease and desist from altering any terms and conditions, rights or privileges and duties of employment in the absence of consent from the Complainant;
 - (f) an order of Reinstatement and Damages against the Respondents to compensate the Grievors for all loss of earnings and other employee benefits occasioned by the aforementioned violations of the Act;
 - (g) an Order of Damages against the Respondents in respect of all losses to the Complainant by reason of the aforementioned violations of the Act;
 - (h) an Order that the Respondents must pay both pre-ruling and post-ruling interest on all amounts owing pursuant to the award of damages requested herein;
 - (i) an Order that the Respondents post a notice at its premises and on each job site informing employees of their rights under the Act and the findings and orders of the Board with respect this Complaint;
 - (j) such further and other relief as may be appropriate in the circumstances.
- I. Further the applicant requests:
- (i) declare that the Respondent Companies be treated as constituting one employer for

the purposes of the *Labour Relations Act* in that, at all material times, they were carrying on associated or related businesses or activities under common direction and control within the meaning of Section 1(4) of the Act;

- (ii) declare that the Respondent Companies as a single employer under Section 1(4) of the *Labour Relations Act* are bound by the Collective Agreements referred to in paragraph II hereof;
 - (iii) order that the Respondent Companies, as a single employer under Section 1(4) of the Act, forthwith apply the full terms and conditions of the Collective Agreements referred to in paragraph II hereof to all work performed by the Respondent Companies.
- II. An Order that the Respondents are bound by and must observe the following Collective Agreements:
- (a) Collective Agreement between the Architectural Glass and Metal Contractors Association and the International Brotherhood of Painters and Allied Trades, et al ("the ICI Agreement");
 - (b) Collective Agreement between Preston & Lieff Glass Limited, et al and the Ontario Council of International Brotherhood of Painters and Allied Trades ("the Non-ICI Agreement").

...

- IV An Order the Respondents to compensate its employees for all losses incurred as a result of the unlawful lockout.

...

36. The applicant further requests an order to cease and desist to channel work away from the unionized entity, an order binding jointly and severally each of the companies, their officers, officials or agents.

37. The applicant submits that the receiver Deloitte & Touche, in line with the Board's jurisprudence, is bound by the orders against the respondent and further that notice of these proceedings to the respondent constitutes notice to the receiver.

Decision:

38. Board File 0515-90-R

This is an application pursuant to section 63 and section 1(4) of the Act. The respondents in their reply to the 1(4)/63 application acknowledged that

Preston & Lieff Glass Limited
 Preston & Lieff Glass Contracts Inc. and
 Preston & Lieff Glass (1988) Limited

are under common direction and control. The respondents further acknowledged in their reply that Preston & Lieff Glass Limited was at all material times bound to the two collective agreements and that Preston & Lieff Glass Contracts Inc. and Preston & Lieff Glass (1988) Limited voluntarily agreed to be bound to the two collective agreements and have at all times complied with the terms, conditions and provisions of the said collective agreements.

39. The respondents took the position that Preston & Lieff Door Ltd. manufactures and

installs hollow doors and metal products. The respondent denied section 1(4) is applicable or in the alternative the Board should exercise its discretion and not make the declaration pursuant to section 1(4).

40. We are satisfied that the statutory preconditions for a section 1(4) declaration have been met. We are further satisfied on the evidence before us that the applicant's bargaining rights have been undermined by the actions of the respondents. The Board in *Donald A. Foley Limited*, [1980] OLRB Rep. Apr. 436 stated:

One of the significant purposes of section 1(4) is to guard against the dilution or undermining of bargaining rights already obtained such, for example, as occurs when work is diverted from a unionized employer to an associated, newly created non-union one as in *Evans-Kennedy Construction Limited*, [1979] OLRB Rep. May 388; or when there is a risk or threat that bargaining rights may be eroded, as in *West York Construction Limited*, [1978] OLRB Rep. Sept. 879. For a more detailed review of the purpose of section 1(4), however, see *Industrial Mine Installations Limited*, [1972] OLRB Rep. Oct. 1029 at paragraphs 9 to 13 inclusive.

Absent any evidence to the contrary the only conclusion the Board can draw from the absence of the respondents and the statements in the respondents reply, that there was a deliberate undermining of bargaining rights by diverting work from the unionized entity to a newly created non-union entity.

41. Accordingly, the Board declares that Preston & Lief Glass Limited, Preston & Lief Glass Contracts Inc., Preston & Lief Glass (1988) Limited and Preston & Lief Door Ltd. are one employer for the purposes of the *Labour Relations Act* and are bound to the collective agreements between:

- (1) The Architectural Glass and Metal Contractors Association and the International Brotherhood of Painters and Allied Trades, et al ("the ICI agreement").
- (2) Preston & Lief Glass Limited, et al and the Ontario Council of International Brotherhood of Painters and Allied Trades ("the non-ICI agreement").

The Board further directs the respondent companies to apply the full terms and conditions of the above collective agreements.

42. In view of our declaration under section 1(4) and the remedies available under the section 89 complaint, the section 63 issue is academic and the Board does not consider it necessary to deal with the matter.

43. Referral of Grievance - Board File No. 2467-90-G

There is insufficient evidence with respect to the remedy requested. This application is dismissed without prejudice to a new application being filed.

44. Referral of Grievance - Board File No. 2555-90-G

On the evidence we find that the respondents have violated the collective agreement as alleged in the applicant's letter dated December 27, 1990. The Board hereby directs the respondents to pay forthwith the remittances owing for the month of November in the amount of \$4,122.37 together with interest as set out in article 13:03 of the ICI agreement.

45. Referral of Grievance - Board File No. 3072-89-G

On the evidence we find that the respondents have violated the collective agreement as alleged in the grievance filed by the applicant dated March 1, 1990. The work that is the subject of this grievance is clearly bargaining unit work covered by the applicants agreement. The Board hereby directs the respondent to pay to the applicant the sum of \$28,529.92. This amount represents the cost for four persons at forty hours per week for eight weeks.

46. Board File No. 2297-90-U

We do not propose to deal with the section 93 application in Board File No. 2297-90-U. The allegations giving rise to the section 93 application are the same allegations as in the section 89 complaint. The remedies requested are available under the section 89 complaint and the section 93 application is therefore dismissed.

47. Board File No. 2298-90-U

This is a complaint under section 89 of the Act, alleging various sections of the *Labour Relations Act* have been contravened. On the evidence we find that the respondents have contravened sections 64, 66 of the *Labour Relations Act*. Sections 64 and 66 provide for:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

48. For the foregoing reasons, the Board hereby orders the respondents, Preston & Lief Glass Limited, Preston & Lief Glass Contracts Inc., Preston & Lief Glass (1988) Limited and Preston & Lief Door Ltd. who have been declared to be one employer for the purposes of the Act forthwith:

- (1) cease and desist from breaching sections 64 and 66 of the Act;
- (2) to compensate the applicant and its members for losses arising out of the violations of the Act, for bargaining unit work performed by

other than members of the applicant together with interest as set out in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35. (See Practice Note No. 13 of the Board's Practice Notes); and

- (3) reinstate members of the applicant to perform all bargaining unit work.

49. The Board remains seized to deal with any matters arising out of the implementation of the Board's orders and directions.

2045-90-R Bob Kennedy and other employees of Ro-Von Construction Limited, Applicant v. International Union of Operating Engineers, Local 793, Respondent v. **Ro-Von Construction Limited**, Intervener

Construction Industry - Petition - Termination - Named applicant in style of cause and only person signing processed Form 17 not at work on application date - Union moving to dismiss termination application - Board noting reference to "other employees" in style of cause and relying on paragraph at bottom of petition as demonstrating intention of all signators to be applicants - Board rejecting union's motion to dismiss - Board finding petition voluntary - Vote ordered

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members J. A. Ronson and K. Davies.

APPEARANCES: George W. Priddle, James Blackburn, Bob Kennedy and Rick Barber for the applicant; B. Chercover, G. Palanuk and Ed Kaplanis for the respondent; Donald Laidlaw for the intervener.

DECISION OF K. G. O'NEIL, VICE-CHAIR AND BOARD MEMBER J. A. RONSON: March 18, 1991

1. The name of the respondent is amended to read: "International Union of Operating Engineers, Local 793".
2. This is an application for termination of bargaining rights in the construction industry.

I

3. The Board received the following documents from the applicant's solicitor together in one envelope:

- (a) A Form 17 which gives "Bob Kennedy and other employees of Ro-Von Construction Limited" as the applicant, and is signed by Bob Kennedy.
- (b) A Form 17 which gives "Bob Kennedy and other employees of Ro-Von Construction Limited" as the applicant, and is signed by six people, including Bob Kennedy.
- (c) A petition bearing signatures of 60% of the bargaining unit.

These documents were sent under cover of a letter which reads in relevant part as follows:

The application herein is being made by Bob Kennedy and other employees. I am therefore enclosing to you one copy of the application signed by Bob Kennedy on behalf of them and another copy that bears other signatures as well.

Being aware of the Board's policy of trying to maintain anonymity in these matters, I would ask that the copy of the application that is used for circulation only contain the signature of Bob Kennedy.

4. Although he had been at work on the day he signed the application, Bob Kennedy was not at work on the application date. (The application date was the following day, the date it was mailed, which was a day off for Mr. Kennedy.) The respondent trade union asked the Board to dismiss the application because of his absence from work, and therefore the bargaining unit. The union submitted that only members of the bargaining unit have standing to bring applications to terminate bargaining rights. As a result of the applicant's request to maintain the anonymity of the signatories other than Bob Kennedy, the union was not made aware of the existence of the Form 17 signed by six people until disclosed to them by the Board during the course of argument on this motion. It became evident as a result of a query from the Board that two of the applicant's intended witnesses who were present in the hearing room, were among the six who signed the second Form 17. Their names are also on the list of people agreed to be in the bargaining unit.

5. On behalf of the union, Mr. Chercover argued that a person not in the bargaining unit has no status to bring an application for termination. In the construction industry it is well established that a person is not at work on the application date is not considered to be part of the bargaining unit. Counsel relied on *Fred Jantz Masonry Construction Company Limited*, [1986] OLRB Rep. August 1083 and the cases cited therein as well as *Smale Bros. Company Limited*, [1986] OLRB Rep. July 1019. After hearing of the second Form 17, counsel added that the only possible interpretation of the documents before us was that there was one applicant and a group of petitioners. The petitioners are entitled to anonymity but the applicant is not. Since the second Form 17 had not been processed, counsel argued that it was not before the Board and therefore we would be acting beyond our jurisdiction to deal with it and would be denying the union natural justice. It did not argue that it was prejudiced by not knowing of the second form or by not knowing the names of others than Bob Kennedy as applicants at an earlier time. It suggested as a practical matter that if we granted its request to dismiss the application, and processed the second Form 17, it would be bound by the determination of voluntariness on the evidence adduced at the hearing already held. It would then advise the Board if there were any remaining issues needing to be heard.

6. The applicant(s) argue that the applicant is a group, not the individual Bob Kennedy; there is only one application, not two, and that the fact that the Form 17 is signed by one person cannot be determinative. Counsel asks us to proceed on the second Form 17 if we agree with the union, but assert that nothing would change. He did not request an amendment of the applicant's name. Counsel also argued that the effect of the Labour Relations Officer report is an agreement that the only issue in dispute was the voluntariness of the petition and that it was unfair to allow union counsel to raise this issue with no notice to the applicants. Union counsel did not attend the meeting with the officer at which certain matters, such as the number of employees in the bargaining unit, had been agreed.

7. Counsel for the applicant argues that there can be no real surprise to the union because the two applications were identical except for the signatures. In the alternative, counsel submitted that if we found there were two applications we should be proceeding on the second one. Further counsel argues that because Bob Kennedy was working on the day he signed the application rather

than the day it was mailed he should not technically fall afoul of the cases that say that a person not at work on the application date could not apply to decertify.

8. In reply Mr. Chercover characterized the matter not as a question of anonymity of the petitioners nor on whose behalf the application was made but rather a question of who was the applicant. After hearing the submissions, the panel reserved on the motion to dismiss.

II

9. The parties agreed that we should hear the evidence on the voluntariness of the petition in any event of the outcome of the above motion. Three witnesses, Bob Kennedy, James Blackburn and Rick Barber were called in support of the voluntariness of the petition. The evidence is summarized below. It was only considered as a basis for the decision on voluntariness, and not as a basis for deciding the motion to dismiss.

10. The union was certified by decision of the Board dated May 19, 1989. In that decision, the Board considered a petition in opposition to the certification and declined to rely on it, because of the signature of one of the foremen.

11. About a year and half passed. The collective agreement signed by the union and employer was to expire on December 31, 1990. James Blackburn and Bob Kennedy organized a meeting for November 1, 1990, and paid for a hotel meeting room for the purpose of presenting a petition to support an application to terminate the union's bargaining rights to members of the bargaining unit. Mr. Blackburn invited people by phone from his home and told them that he and Mr. Kennedy had seen a lawyer and wanted to see if a vote could be held on whether the people still wanted the union.

12. Mr. Priddle, counsel for the applicants, addressed the meeting, explaining in general terms what it meant to decertify a union. He then personally conducted a secret ballot as to whether or not those present wished to decertify the union. Mr. Priddle counted the ballots and, while not disclosing the count of that ballot, communicated to the meeting that there were enough ballots in favour to decertify the union. He read aloud a petition, which he had drafted on Messrs. Blackburn's and Kennedy's instructions, in the following form:

WE, the UNDERSIGNED employees of RO-VON CONSTRUCTION LIMITED, HEREBY SIGNIFY in writing that we no longer wish to be represented by the trade union International Union of Operating Engineers Local 793 and we are requesting termination of their bargaining rights.

• • •

THIS DOCUMENT is submitted by the applicants whose addresses are set out above and whose address for service is care of Messrs. PRIDDLE, PAWELEK AND LAWSON, Barristers and Solicitors, 645 Queen Street East, Ste. Marie, Ontario P6A 2A6.

13. Mr. Priddle explained to the meeting that no-one had to sign the document. Messrs. Kennedy and Priddle then witnessed all the signatures on the document in the washroom of the meeting room to ensure privacy. Mr. Blackburn testified he never discussed the matter with foremen or supervisors of the company; there was no evidence that anyone did. The men at the meeting were told to keep the matter to themselves. None of the foremen or the supervisors were invited to the meeting nor were union supporters. There are four or five people in the bargaining unit related to the owners who were invited. Two are sons and the others are brothers of the owners. Neither Messrs. Blackburn or Kennedy were of the view that who signed would get back to the owners because of the presence of these family members given past experience of their not "telling

tales". People who came to the meeting were asked to chip in for the lawyer's fees. Some of the family members of the owner contributed.

14. At the meeting, which lasted approximately two hours including the time to conduct the ballot and receive signatures, no-one tried to persuade anyone to sign or not to sign. Mr. Kennedy signed as a witness to each signature but he nor any of the others who signed could see what was on the upper portion of the document because Mr. Priddle was covering it up to prevent the person signing from seeing who had signed before.

III

15. In argument as to the voluntariness of the petition, Mr. Priddle urged us to accept the petition as voluntary. He underlined that no evidence of management involvement had been brought and that the driving force behind the petition was discontent with the union's handling of negotiations. He argued that the petition had been handled in a scrupulous manner to protect anonymity.

16. As to the members of the bargaining unit who were relatives of the owners, Mr Priddle asserted that they had no opportunity to tell management because all of the signatures were taken at the meeting and they could not know who or how many signed because of the procedure used. He referred us to *Domus Building Cleaning Co. Ltd.*, [1986] OLRB Rep. March 319 where a friend of management circulated a petition on company premises as the type of facts which the Board has found objectionable. He asserted that although we must look at perception the Board must not be over-protective to the point of making it impossible to decertify. A balance must be struck.

17. On behalf of the union Mr. Chercover referred us to the Board's decision on the certification of the union for this bargaining unit, an unreported decision in Board File 1640-87-R dated May 19, 1989. The petition was found to be unworthy of being relied on because of the presence of a foreman's signature.

18. Mr. Chercover underlined that the onus was on the petitioners and that it had not been satisfied. He emphasized that the union supporters had not been invited to the meeting; the family and friends of the owners could have unduly influenced the people at the meeting. The situation under which people signed with Mr. Priddle and Kennedy is also prone to undue influence, counsel asserts. Counsel suggested that there were too many questions, all of which go to how satisfied the Board was as to the voluntariness of the petition. In the category of unanswered questions, counsel puts the fact that Mr. Kennedy did not actually see what the people signed. He said we should not accept that Mr. Kennedy actually witnessed the signing as he says he does not know what document they were signing. More importantly he asks how the Board can be assured that the people who signed knew what they were signing. He asserted that it would have been incumbent on the petitioners to produce any children of the owners who signed the petition to say it was not their father's money that was contributed to pay for the lawyer. Counsel argued that the jurisprudence is settled that the Board will not act on a petition unless it is satisfied on the evidence of the appearance of voluntariness. Counsel submits that with the history of an application for certification where the petition was rejected and the involvement of the family members, we should dismiss the application.

19. In reply, Mr. Priddle said there was no connection between the earlier petition and this one, and that the Board has on many occasions found petitions voluntary even if people involved were related to management. He urged us to put Mr. Kennedy's evidence that the petition was covered in the context of the meeting in which the whole process was explained to people, there

had been a prior ballot as to whether the people wanted to decertify, and the fact that it was signed and witnessed in privacy.

IV

The Preliminary Motion to Dismiss

20. Section 57(2) of the *Labour Relations Act* provides as follows:

57. ...

(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be.
- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

21. We agree that the issue to be decided is who is the applicant. The facts tending to support the motion are the fact that Mr. Kennedy is the only named applicant in the style of cause and the only person who signed the Form 17 which was processed. The facts going to the opposite conclusion are that the style of cause, "Bob Kennedy and other employees" as well as the paragraph at the bottom of the petition form demonstrate an intention of all the signators to be applicants. Both the style of cause and the wording of the petition were available to the union from the time they had notice of the application from the Board.

22. The respondent's motion to dismiss is supported by a number of cases in the construction industry where applications for termination of bargaining rights were dismissed after a finding that the applicant was not at work on the application date. These include the ones cited by Mr. Chercover, mentioned above, as well as *Howard S. Clark Construction*, [1968] OLRB Rep. April 62, *Uni-Form Builders Limited*, [1968] OLRB Rep. April 60 and *T. E. Leroux Contracting Ltd.*, [1982] OLRB Rep. Aug. 1204. Supporting the opposite conclusion is *Lakeview Sheet Metal (Orillia) Limited*, [1979] OLRB Rep. June 537 which was specifically not followed in *Smale Brothers Company Limited*, *supra*. Many of the above cases are distinguishable on the facts. None of those cases involved a style of cause similar to the one before us in this case. As well many of them were circumstances in which if the applicant was not counted, there was nobody in the bargaining unit. See *Smale Brothers Company Limited*, *T.E. Leroux*, *supra*. On our facts, not counting Mr. Kennedy as one of the members of the bargaining unit does not leave an empty bargaining unit. In *Howard S. Clark Construction*, *supra*, the question was whether or not the trade union which had entered into a voluntary recognition agreement with the employer had been representative at the

time the agreement was entered into. At that time the union claimed to represent only one employee; that person had not been at work in the bargaining unit on the date of the application. Thus the Board found that the applicant had not established that he was a person entitled to bring the application and that the union had not established it represented any employees at the time the agreement was entered into and dismissed the application. The report of *Uni-Form Builders Limited*, *supra*, does not disclose whether there were other people in the bargaining unit. In *T. E. Leroux*, *supra*, none of the applicants were employees in the bargaining unit. In *Fred Jantz Masonry Construction Company Limited*, *supra*, the Board found that at the time the application was made there were no employees in the ICI bargaining unit and hence no-one entitled to bring a termination application. There were workers outside the ICI sector who were entitled to bring the termination application and in respect of those employees the union indicated that it did not seek to maintain bargaining rights. Therefore pursuant to section 57(5) their bargaining rights were terminated.

23. Closer to the facts of our case are a line of other cases which support the proposition that the application in this case is not defective and should be acted upon by the Board. *Dominion Stores Ltd.*, [1970] OLRB Rep. Nov. 853 was a case in which the person who signed the application for termination on behalf of the part-time unit was a member of the full-time unit. The Board noted that the style of cause was "R. Forget and a group of Employees". The Board said at paragraph 4:

In our opinion, whatever may be said of Forget's status as an applicant, the employees who identify themselves as such on the statement accompanying the formal application are *prima facie* entitled to bring the application and are entitled to employ Forget as their representative as indicated in the covering letter and Forget's testimony.

See also *City Parks Apartment Ltd.*, [1964] OLRB Rep. June 147 where there was a dispute as to whether the applicant was a member of the bargaining unit. Although the Board eventually found the applicant to be within the bargaining unit it said the following in the concluding paragraph of its decision:

In the circumstances of this case having regard to the fact that this application was made by "the employees of *City Park Apartments Ltd.* represented by S. Bell", even if we had found that S. Bell was not included in the bargaining unit because of some special arrangement between the parties to the collective agreement, the fact that he represented the employees who are the applicants in this matter, would not be fatal to this application since we have found that S. Bell does not exercise managerial functions....

24. This approach has been supported in more recent cases among which include *Huntsville I.G.A.*, [1987] OLRB Rep. Dec. 1517, *Lakeview Sheet Metal (Orillia) Limited*, [1979] OLRB Rep. June 537, *St. Michael's Shops of Canada Limited*, [1979] OLRB Rep. Oct. 1023, *Cara Operations Limited*, [1984] OLRB Rep. Oct. 1378. In *Huntsville I.G.A.*, the applicant brought an application for termination on behalf of three bargaining units when he was a member of only one. The Board, after making reference to some of the cases referred to above, including *Smale Brothers*, *supra*, indicated its willingness to look beyond the mere form of the application and the technicality of the nominal applicants in order to determine who the "true applicants were". Citing evidence of a petition which clearly expressed the employees' wish to terminate the union's bargaining rights and the designation of the applicant to represent them, the Board acted on the petitions for the three bargaining units. The Board said at paragraph 10:

10. In our opinion we should not take an unduly "technical" view of applications such as these, and we are supported in that approach by cases such as *Gardiner's Supermarket Limited*, [1985] OLRB Rep. Dec. 1737; *St. Michael Shops of Canada Limited*, [1979] OLRB Rep. Oct. 1023; *Thomas Construction (Galt) Limited*, [1982] OLRB Rep. Nov. 1727 and *Cara Operations Lim-*

ited (*Retail Stores Division*), [1984] OLRB Rep. Oct. 1378. Indeed, the situation in *Cara Operations Limited* is very similar to the present one because, there, the *nominal* applicants were members of a full-time bargaining unit, but the termination application and the related anti-union petition encompassed employees in the part-time bargaining unit as well. The Board found that the *nominal* applicants were making application both on their own behalf, and on behalf of the employees in the other bargaining unit. That approach was approved and followed by the Board in *Economy Fair*, [1985] OLRB Rep. Sept. 1357.

11. We are inclined to take the same view. In the instant case it is evident from the documentary and other evidence before us that the majority of the employees in each bargaining unit wish to terminate the respondent(s) bargaining rights, and have designated Mr. DeHaan to take such steps as are necessary to accomplish that objective. Indeed, had Mr. DeHaan framed his application as being on his own behalf and on behalf of the signatories to the supporting petition there would be no issue. But when the application and the petition document are read together, that is obviously the employees' intention, and we find nothing fatal in the omission of those words from the application's style of cause. While the nominal applicant (Mr. DeHaan) is a member of the meat department bargaining unit, we find that this application is, in fact, being made by a majority of employees of each of the three bargaining units, and that the documentary and other evidence before us warrants the taking of a representation vote to test the union's continued support.

25. In *Selinger Wood Ltd.*, [1979] OLRB Rep. May 434 the employee named as the applicant in the style of cause advised the Board at the hearing he was withdrawing. The Board proceeded to hear and to determine the application when the two employees who were signatories to the document and present at the hearing made it known that they wished the Board to proceed.

26. In *St. Michael Shops of Canada Ltd.*, the Board treated a petition which contained signatures of both full and part-time employees to be sufficient to support an application for termination of bargaining rights in two separate bargaining units. The Board was thus satisfied that the application had been made by employees in the part-time unit even though the named applicants were full-time employees. The Board read all the documents together and was satisfied that an application had been made by employees in the part-time unit. A similar result was obtained in *Cara Operations Limited*, *supra*.

27. Having considered all the above jurisprudence and the submissions of the parties, it is our view that it would be unduly technical to dismiss this application given the specific facts of this case. The style of cause and the form of petition make it clear that Mr. Kennedy was not the only applicant. Reading the documents submitted as a whole, we find that all of the petitioners intended to be applicants in this matter. We emphasize that this is not a case where prejudice to the applicant was argued or shown in not being informed of the names of other applicants. In coming to this conclusion that others besides Mr. Kennedy are applicants, we are not departing from the now well-established jurisprudence pertaining to the construction industry to the effect that a person not at work in the bargaining unit on the application date is not a member of the bargaining unit for the purposes of the count. Bob Kennedy is not to be counted as a member of the bargaining unit for the purposes of determining whether forty-five percent of the employees in the bargaining unit have voluntarily signified that they no longer wish to be represented by the union.

V

The Voluntariness of the Petition

28. We have carefully reviewed the evidence and submissions and are of the view it is more likely than not that the petition represents the voluntary views of those who signed it. The Board has given particular attention to the evidence about the presence of family members of the owners at the meeting where the signatures were obtained. The possibility exists that they could have

unduly influenced the people at the meeting to be seen to be in favour of ridding themselves of the union. However, there is no evidence of such influence, and we are not prepared to draw such an inference from their presence alone. In any event, we are of the view that the double secret ballot in this case and the facts that no numbers were disclosed to any of the participants at the meeting are sufficiently weighty factors to outweigh any concern about the effect of their presence. Further, this is not a case where the family members were circulating the petition as in many of the cases where a family relationship has been a factor in deciding that a petition was not voluntary. Although Mr. Blackburn was a cousin of a foreman as well, this fact alone is insufficient to warrant a finding that the petition was not voluntary. There was no evidence that this fact is known or that it warranted the inference that people signed with a concern that he would let his cousin or other members of management know if they signed or not. Further none of the employees other than Mr. Kennedy knew who else had signed before they signed. As well, the Board has often stated that it will not lightly deprive employees, including the relatives of management, of their rights under the *Labour Relations Act*. We view their participation in the process, including their contribution to the legal fees, as part of the exercise of these rights, and in the absence of evidence which convinces us that their mere presence would create a perception in the employees that management would learn if they signed or not, we do not find it fatal to the application.

29. We have reviewed the decision of the Board dated May 19, 1988 certifying the union in this matter and its remarks on the petition circulated at that time. We do not see anything in it which would prevent us from finding the more recent petition to be a voluntary expression of current employee wishes. There was no evidence to connect the two in a way which would taint the latter. The fact that there was evidence that at least one person signed both is not enough to warrant an inference of involuntariness given the very different circumstances of the two petitions. Underlining the difference is the fact that this is a termination application, not a certification application, and the Board is more reluctant to draw inferences of involuntariness where there is not the sudden change of heart of those who have recently signed a union card as there would have been in the certification application situation.

30. We also do not find merit in the submission that we cannot be assured that the employees knew what they were signing because the top part of the document was covered so as to avoid knowledge of who had signed before. The document had been read aloud at the meeting and the purpose of the meeting explained both when the employees were invited and during the course of the meeting. The purpose of signing the petition after the secret ballot to indicate whether there was adequate support for an application to terminate was also explained by Mr. Priddle at the meeting. As to the fact that known union supporters were not invited, the Act imposes no obligation to solicit opposing points of view when preparing an application for termination.

VI

31. On the basis of the evidence and representations before it, the Board is satisfied that not less than forty-five per cent of the employees of Ro-Von Construction Limited in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on November 20, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 57(3) of the said Act.

32. The Board directs that a representation vote be taken of the employees of Ro-Von Construction Limited in the following bargaining unit:

All employees of Ro-Von Construction Limited in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.

All those employed in that bargaining unit on the date of this decision who are so employed on the date the vote is taken will be eligible to vote.

33. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Ro-Von Construction Limited.

34. In the result it is unnecessary to determine the issue raised by the applicant as to the effect of the Labour Relations Officer's meeting or the Form 17 signed by the six people or the Form 17 filed on December 6, 1990 (which has not been processed, and in the result need not be.)

35. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER KAREN S. DAVIES; March 18, 1991

1. I have read the decision of the majority and with respect I cannot agree.

2. I cannot agree that in the circumstances of this case that the petitioners are the applicants. Further, I have serious concerns about the effect of the majority ruling on the application of section 103(2)(i) should the majority employees vote against termination of the union's representation rights.

3. Form 17 requires that the applicant provide a name, address and telephone number and a copy of Form 17 is sent to the respondent union. The union is required to reply on Form 20.

4. In accordance with Rule 72, if the union intends to adduce evidence that there has been improper or irregular conduct in the gathering of written evidence which signifies the employees no longer wish to be represented by the trade union, the union must file those facts on which it intends to rely prior to the hearing. It must be recognized that Form 17 requires that there be an applicant and the union is entitled to know who the applicant is in order to prepare its case at the Board. Section 111(1) of the *Labour Relations Act* prohibits the disclosure without the consent of the Board, of whether a person does or does not wish to be represented by a union.

5. In short, Form 17 requires the applicant to provide a name and a union is provided with a copy of Form 17. However, the union is not entitled to know the names of the petitioners. Accordingly, the *Labour Relations Act* does not contemplate that petitioners are applicants.

6. The jurisprudence of the Board must be read in light of this fundamental nature of the *Act* and its Regulations.

7. In *Howard S. Clark Construction*, [1968] OLRB Rep. Apr. 62 an application was made under what is now section 60(1). The Board determined that as the applicant was not in the bargaining unit on the date of the application, the applicant was not an employee and therefore the application was dismissed.

8. In *Uni-Form Builders Limited*, [1968] OLRB Rep. April 60 an application was made under what is now section 57(1) of the *Act*. The Board stated at paragraph 4:

"If a person is not employed in the bargaining unit on the date an application for certification is

made under the construction industry sections, he is not considered to be an employee of the company and the bargaining unit for the purpose of determining the union's membership position."

The Board went on to conclude that:

5. Since the applicant was not an employee of *Uni-Form Builders Limited* in the geographic area described in the certificate, on the date of this application, the applicant was not an employee of the company in the bargaining unit as required by section 96(1) (now section 57(1)) of the Act and therefore had no status to bring this application...

9. In *Saint Michael's Shops of Canada Limited*, [1979] OLRB Rep. Oct. 1023, an application was made for termination of the bargaining rights of a union for two bargaining units at one employer. The application was made by two employees who were employed in only one of the bargaining units. At paragraph 10, the Board stated:

The respondent trade union represents both the full-time and part-time employees of the intervener employer and the terms and conditions of employment for each of the two categories of employees is contained in the single collective agreement. In the application before us, the unit defined is the sum of the two bargaining units defined in that collective agreement so there can be no doubt that the application was filed to cover both units. The schedules filed by the intervener identified employees as either full-time or part-time, so the Board is able to identify the employees' names on the petition with each of the two units. Thus the application when taken together with the statement, and having regard to the heading note on the petition, establishes that the employees of both bargaining units defined in the collective agreement between the respondent and the intervener are applying for declaration that the respondent no longer represents them as their bargaining agent. Having regard to these circumstances, we are satisfied in this case that an application within the meaning of section 49(2) has been made by employees in the part-time unit ...

10. It should be noted that the application and petition treated the employees as one group and did not differentiate between the full and part-time bargaining units.

11. The next in the line of cases is rather bewildering. *Lakeview Sheet Metal (Orillia) Limited*, [1979] OLRB Rep. June 537 cited no cases and stated that the considerations of speed and expediency which apply to certifications in the construction industry do not apply to terminations. The Board found that individuals who were not employed on the date of the application were still employees entitled to bring an application for termination of bargaining rights. The subsequent case of *T.E. Leroux Contracting Limited*, [1982] OLRB Rep. Aug. 1204 takes an entirely opposite approach. Regarding section 57(2) the Board states "the legislation is clear, an application for termination can only be brought by employees in the bargaining unit".

12. *Cara Operations Limited*, [1984] OLRB Rep. Oct. 1378 had similar facts to *St. Michael's*. The two individuals named on the application were members of a full-time bargaining unit. The employer had a part-time and full-time bargaining unit and the petitioners were from both bargaining units. At paragraph 11, the Board stated:

The question to be determined is, on the facts before the Board, who is or are the true applicants and whether they are the employees referred to under section 57(2) The respondent represents both bargaining units of the employees of the intervener in two similar but separate collective agreements. The applicants have defined in the application the two bargaining units. The Board was able to make the preliminary counts at the hearing with respect to both bargaining units so as to cause the Board to inquire into the voluntary signification of the employees in writing in support of this application. The statements of desire have been signed by the employees in both bargaining units. While Mrs. Young and Ms. Gattwald are the nominal applicants in this application, in our view, when the formal application in Form 17 and the statements of desire are considered together, the application has been made by employees in both bargaining

units and employees in both bargaining units have applied for a declaration that the respondent no longer represents them as their bargaining agent. See *St. Michael's Shops of Canada Limited*, supra.

13. In *Stuart Riel Masonry Contractor*, [1984] OLRB Rep. Nov. 1630 at para. 10 the Board stated:

In the construction industry, because of the short term nature of the employment relationship, it has been the consistent policy of the Board over many years to count its employees as only those employees at work on the application date. *This applies equally to applications for certification and for termination of bargaining rights.*

[emphasis added]

14. A similar result for similar reasons occurred in *Smale Brothers Co. Ltd.* [1986] OLRB Rep. July 1019.

15. In *Fred Jantz Masonry Construction Co. Ltd.*, [1986] OLRB Rep. Aug. 1083, an application was made by employees in the ICI sector for termination of the bargaining rights in both the ICI sector and the non-ICI sector of the employer. The Board found that there were no employees in the non-ICI sector and therefore there were no employees entitled to bring an application for termination. The fact the ICI sector employees brought an application for termination of rights in both sectors would not allow the ICI sector employees to apply for termination of non-ICI sector bargaining rights. This, of course, is to be contrasted with the above cases where the “nominal applicants” (i.e. those whose names appeared on the application) were members of a full-time bargaining unit and the application was for termination of bargaining rights in both full-time and part-time bargaining units.

16. In *Huntsville IGA*, [1987] OLRB Rep. Dec. 1517, an application was made for termination of bargaining rights in three bargaining units by a “nominal applicant” who was a member of only one unit. In the petitions submitted by all employees, they stated that they had appointed the applicant to represent them in the matter before the Board. In examining prior cases from the Board that determined that an individual who was not an employee on the day in question could not bring an application on behalf of other employees, the Board stated a paragraph 9:

None of these cases involve documentary or other evidence of the kind before us: a petition which clearly expresses the employees' wish to terminate their union's bargaining rights and a designation that the applicant ... will represent them in this matter. The plain meaning or natural implication of those words is that the employees are authorizing ... (the applicant) to file a termination application on their behalf. The reading of the petition document is entirely consistent with the evidence concerning the discussion with the employees which led to their signing of the petition document.

The Board stated at paragraph 10:

In our opinion we should not take an unduly “technical” view of applications such as these Indeed, the situation in *Cara Operations Limited* is very similar to the present one because, there, the nominal applicants were members of a full-time bargaining unit, but the termination application and the related anti-union petition encompassed employees in the part-time bargaining unit as well. The Board found that the nominal applicants were making applications both on their own behalf, and on behalf of the employees in the other bargaining unit.

17. From the above review of the jurisprudence, it is clear that the Board departs from its general rule that an applicant must be an employee in the bargaining unit on the day of the application only in certain circumstances. One example of such circumstances is when there are two bargaining units and the “nominal applicant” is from only one bargaining unit. Another example is

where the employees explicitly authorize the applicant to file on their behalf. Neither example is analogous to the present case.

18. As noted above, the union is entitled to know who is the applicant: Form 17. If all the petitioners are considered to be applicants the trade union is entitled to know the identity of all the applicants. Section 111(1) of the *Labour Relations Act* protects the identity of the petitioners unless they so choose to waive this protection and thereby reveal their identity. The majority here has decided that all petitioners are applicants and in so doing gives cause to reveal to the union the identity of all the petitioners as a matter of natural justice.

19. The union is entitled to know who all the parties to the proceedings are as a matter of natural justice. This knowledge determines how the union will proceed. Unless there are exceptional circumstances, such as identical bargaining units consisting of full and part-time employees, the union is denied natural justice when the concept of “nominal applicants” is used. As stated in *De Smith's Judicial Review of Administrative Action*, 4th ed. by J. M. Evans:

Natural justice generally requires that persons liable to be directly affected by ... decisions or proceedings be given adequate notice of what is proposed, so that they may be in a position:

- (a) to make representation on their own behalf, or
- (b) to appear at a hearing or inquiry ...; and
- (c) effectively to prepare their own case and to answer the case “if any” they have to meet.

20. The union will be unable to make representations on its own behalf and to effectively prepare its own case if it is faced with the phantom of a nominal applicant.

21. In my opinion, the style of cause on Form 17 must give the name of an employee entitled to bring the application. A phrase such as “Group of Employees” is insufficient as counsel may sign the application.

22. The only logical conclusion is that the *Act* and applicable jurisprudence demand that an application for termination must contain the name or names of an employee entitled to bring the application unless there are exceptional circumstances such as described above. No such exceptional circumstances have been presented to the Board. Therefore the applicant is not an employee and cannot bring the application.

23. My second concern regards section 103(2)(i) on the effect the ruling of the majority - that a petitioner is an applicant - may have on either on a bar or a refusal by the Board to entertain an application.

The section reads as follows:

103(2) - Without limiting the generality of subsection (1), the Board has the power,

...

(i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees within a period not exceeding ten months from the date of the dismissal of the unsuccessful application.

24. If, as the majority argues, any individual who has signed the petition requesting a termination vote is in fact an applicant, then all such petitioners would be subject to the Board's power to bar an unsuccessful applicant. If the majority of the employees of Ro-Von vote to continue the representation rights of the union, and the Board exercises its power to bar an unsuccessful applicant, then any of the petitioners/applicants from the original application would not be allowed to have their signatures counted towards the 45 percent of employees in the bargaining unit required for a termination vote. In short, if all petitioners are applicants, then no petitioner from the first application would be allowed to have their signature on a second petition be counted towards the 45 percent required for a vote.

25. With regard to this section, the Board in *K-Mart Canada Limited*, [1983] OLRB Rep. Dec. 2039 at para. 9 stated:

There is one final piece to the legislative framework for determining the timeliness of termination applications. The legislature decided that in some circumstances a restriction ought to be placed on repeat applications made during the open season. Rather than enact in detail statutory rules, the Board was granted a discretion to refuse to entertain a second or subsequent application, pursuant to section 103(2)(i). In other words, the Act delegates to the Board the task of striking an appropriate balance between employee free choice and stable and best relations in the context of successive termination applications.

26. After examining cases where the termination application had not resulted in a vote, the Board stated at paragraph 17:

In all of these cases the Board refused to permit a second application until a reasonable time for collective bargaining had elapsed, even though the wishes of employees had not been tested. By contrast, the Board has on at least three occasions allowed a second application on the heels of the first in the course of an open season.

The Board, at paragraph 20 stated:

These two lines of authority assigned differing relative weight to the competing policy objectives of employee free choice and continuity of collective bargaining.

The Board went on to state at paragraph 21:

In the absence of any other considerations, we would balance these conflicting goals by refusing to entertain this second application in the case at hand. As the evidence called by the first applicant did not demonstrate that the petition was a voluntary expression of those who sign it, that application was dismissed without directly testing the wishes of employees. Employee free choice would be served by allowing a second application. But to permit another challenge to the union's bargaining authority would be to seriously impede negotiations for a new contract to the detriment of those who favoured collective bargaining.

27. The upshot of the above is that where a bar has not been imposed on the first application but rather the respondent seeks to have the Board refuse to entertain the second application, there is a conflicting line of authorities. My concern is that if the employees of the employer vote to continue having the union represent them in their relations with their employer, a second application will be filed where the same issues which troubled the Board in *K-Mart* will have to be relitigated. If the majority is firm and sincere in their belief that all petitioners are applicants then the majority should also be prepared to rule, in the event that the termination vote is unsuccessful, that all the petitioners are barred from being applicants in a subsequent application. If the petitioners wish to reap the benefits of being applicants they must also be prepared to pay the cost.

28. I am not unmindful that section 103(2)(i) allows the Board to "... refuse to entertain a new application ... by any of the employees affected by an unsuccessful application ...". This how-

ever, only reinforces my belief that petitioners are not applicants in the circumstances of this case. If, for purposes of this section, the petitioners are only "employees affected by an unsuccessful application" then they cannot have been applicants for an unsuccessful application.

29. To summarize, I disagree with the majority that in the circumstances of this case the petitioners are also applicants; however, the majority must be prepared to follow through its logic by being prepared to bar the petitioners from being involved in any subsequent application if an application bar is imposed against the applicant.

30. In the interest of natural justice I would have dismissed the application.

2386-90-R Ann Gratton, Applicant v. Ontario Nurses' Association, Respondent v. Sidbrook Private Hospital, Intervener

Termination - Employees discharged, allegedly for cause, casting ballots in Board ordered termination vote - Ballots segregated - Discharges grieved but arbitration unlikely to occur before year-end - Whether ballots ought not to be counted - Whether new vote ought to be conducted - Board determining that outcome of termination application must await outcome of arbitration hearing - Parties directed to advise Registrar when arbitration award released

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

APPEARANCES: *C. J. Abbass* and *Ann Gratton* for the applicant; *Loretta Mikus* and *Jan Davidson* for the respondent; *Oscar Sala* and *Ken Crossfield* for the intervener.

DECISION OF LOUISA M. DAVIE, VICE-CHAIR AND BOARD MEMBER BROMLEY ARMSTRONG: March 6, 1991

1. This matter came on for hearing before this panel of the Board on March 6, 1991. At that time a majority of the Board, Mr. Shamanski dissenting, rendered the following oral ruling:

The issue to be resolved in this instance is whether the segregated ballot of Ms. Ford and Ms. Gibson ought to be counted. Ms. Ford and Ms. Gibson were discharged from their employment several months before this application for termination was filed. The employer asserts that their discharge was for cause. Ms. Ford and Ms. Gibson have grieved their discharge and the matter is to be arbitrated. It would appear however, that their arbitration hearing is unlikely to occur before December 1991 with the decision to follow sometime thereafter.

The termination application filed pursuant to section 57 of the Act was filed on December 10, 1990. By decision of the Board dated January 7, 1991, a vote was ordered to be held. That vote was conducted on January 24, 1991.

In view of the non-segregated ballots that have already been counted, the segregated ballots can and will have a direct impact on the ultimate disposition of this application.

Counsel on behalf of the applicant asserts that the persons whose ballots have been segregated are not employees and their ballots ought not to be counted. Alternatively, he asserts that, in light of all of the circumstances (including the factor of a spoiled ballot) the Board ought to conduct a new vote. To address the concerns of the trade union with respect to the possibility of

gerrymandering and potential abuses caused by ordering a new vote (as well as problems caused by the delay in taking a new vote), he submits the Board ought to revote the same constituency.

Counsel for the employer (intervener) supports these submissions.

Counsel on behalf of the Ontario Nurses Association submits that the outcome of this proceeding must await the outcome of the arbitration proceedings. In support, counsel refers to *Don Mills Foundation for Senior Citizens Inc.*, [1984] OLRB Rep. April 586.

We are concerned about the delay which will result if the outcome of this application must await the outcome of the arbitration proceedings (which will not take place until at least 1 year after this application was filed). The adage of labour relations delayed is labour relations denied springs readily to mind.

Nonetheless we are equally concerned that the ultimate disposition of this application reflect the true wishes of the employees who will be affected by it. In that sense, the outcome should not depend on how persons who were not employees at the relevant time voted. Conversely, the outcome should not ignore the wishes of those employees who continued to have a legitimate interest and connection with the bargaining unit but who were not at work at the relevant time because they had been discharged without just cause and may be reinstated to employment (so that they would have been at work and able to vote but for the employer's actions in violation of the collective agreement.)

In all of the circumstances and for the reasons enunciated in *Don Mills Foundation for Senior Citizens Inc.*, *supra*, we have determined that the outcome of this matter must await the outcome of the arbitration hearing.

The parties are directed to advise the Registrar when the arbitration award is released. At that time they must also advise the Board of their position with respect to the disposition of this application, including any request to reschedule this matter for hearing. The parties are directed to make their submissions to the Board within thirty days of the release of the arbitration award.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; March 28, 1991

1. I am of the opinion that Ms. Ford and Ms. Gibson's ballots ought not be considered for the purpose of ascertaining the vote count in this application for termination. Both these individuals were discharged by the company some months before this application was filed and for all intent and purpose are not entitled to cast a ballot.
 2. Albeit no evidence was presented at the hearing either one way or the other whether the terminations of Ford and Gibson necessitated the hiring of placements. We can with a degree of safety assume that replacements were hired considering the nature of services provided by Sidbrook Private Hospital for its clients.
 3. It would therefore seem to me that the replacements would qualify to cast a ballot at the time of the vote and not Ford or Gibson irrespective of whether their case is going to arbitration or not.
 4. It further seems to me that this is a classical case of "labour relations delayed is labour relations denied". In conclusion I would have directed the disclosure of the vote results and discarded the segregated ballots of Ford and Gibson.
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2778-89-U Spar Professional and Allied Technical Employees Association, Complainant v. Spar Aerospace Limited, Respondent

Change in Working Conditions - Unfair Labour Practice - Union and employer parties to 12 year collective bargaining relationship - Employer never paying maturity and promotional increases according to provisions of expired collective agreement during statutory freeze - Whether in breach of freeze provision in the Act - Board rejecting employer argument that practice during previous freeze periods should override practice under provisions of collective agreement during its currency - Complaint upheld and Board remaining seized with respect to compensation

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members J. A. Ronson and E. G. Theobald.

APPEARANCES: Maurice Green and Hermine Borduas for the applicant; Brian Burkett, John Stewardson, Lynne Ivanovich for the respondent.

DECISION OF K. G. O'NEIL, VICE-CHAIR AND BOARD MEMBER E. G. THEOBALD: March 27, 1991

1. This is a complaint under section 89 of the *Labour Relations Act* alleging breaches of section 64, 70, and 79(1). At the hearing the union complainant clarified that it was pursuing the matter only in relation to section 79(1), the "freeze provisions". Therefore the complaint is hereby dismissed in regards to sections 64 and 70.

2. The company (sometimes referred to below as "Spar") is involved in the aerospace industry; the division covered by this dispute makes remote manipulator systems, better known as "the Arm". The parties to this dispute have a collective bargaining relationship that is 12 years old. There have been four sets of negotiations prior to the current round, commencing in 1978, 1982, 1985 and 1987. The employer has never paid maturity and promotional increases during the statutory freeze. The issue to be decided is whether this fact represents "business as usual" or whether its most recent manifestation is a breach of the freeze provisions in the Act. The union (sometimes referred to below as "SPATEA" or the "Association") argues that the freeze in the Act extends the terms of the collective agreement which they say are clear on their face requiring the payment of such increases. The employer takes the position that to pay these increases would be a departure from business as usual given its well established practice during other freeze periods.

3. The evidence in this matter was not substantially in dispute although the parties' characterization of it differs greatly. Mr. John Stewardson, Director of Personnel and Employee Relations, and Mr. Eric Quittner, past President and now a member of SPATEA's executive, both of whom have been heavily involved in negotiations throughout the relationship between the parties, gave that evidence. It will be summarized as necessary below.

4. Section 79(1) provides as follows:

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

- (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
- (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

5. The relevant collective agreement excerpts are appended to this decision as Appendix "A" due to their length. It contains language from the agreement covering the Metropolitan Toronto bargaining unit which is agreed to be identical to the relevant language in the collective agreement covering the Shirley's Bay bargaining unit, the other group involved in the complaint. The terms will be described in the body of the decision which follows.

6. On December 15, 1989, the company wrote the following letter to SPATEA's President:

This is to confirm to you that following the expiry of the collective agreements between Spar Aerospace Limited and the Spar Professional and Allied Technical Employees Association on December 31, 1989, no salary increases will be processed for employees in the bargaining units in Toronto, and Shirley's Bay until renewal of the collective agreements are concluded. This is in accordance with the company's position and practice and all prior negotiations with SPATEA.

7. The most recently expired collective agreement, like its predecessors, has a fairly unusual salary system. The salaries are set according to a grid in the collective agreement. However, it is not the common type of salary grid on which people are placed and then progressed from year to year. This grid is composed of a starting rate and control points. On hiring a salary rate is set which can be no lower than the minimum rate for the classification but may well be higher. The collective agreement then provides for various increases. These include general increases to the grid and performance, maturity and promotion increases which are based on individual characteristics. This complaint relates only to maturity and promotion increases. Specific calendar dates are set out for the payment of the general increases and the determination of performance increases. Maturity increases are linked to the date of entry into the bargaining unit and promotion increases to the date of promotion. On hiring, new employees are given a collective agreement and told that they will be appraised ten to twelve weeks after hiring and normally after six months. The details of when increases are allowed is not explained but they are given a copy of the collective agreement.

8. The collective agreement provides a formula for each kind of salary increase. In order to determine what the individual receives, one performs the calculations according to the formula and then compares the result with the salary scale and the appropriate control point. An amount over the control point is forfeited, partially or completely, depending on its category. The control points are derived from data from the Pay Research Bureau and are described by the parties as their attempt to tie salaries at Spar to the outside world, to ensure that fully performing employees at Spar are paid at or above a figure comparable to 75 percent of their professional equivalents.

9. The company's position given in evidence was that at the date of the expiry of the collective agreement the salary scales are extinguished and that once the salary scales are extin-

guished, the salary administration scheme cannot be carried out. Historically, the parties have dealt with salary between expiry and the conclusion of a renewal agreement by complete retroactivity to the expiry date of the previous collective agreement for monetary matters, including the disputed maturity and promotion increases. The union does not disagree that that is how the company has dealt with these matters; rather it disputes the significance of this fact. It says that it has objected on an ongoing basis to the practice of not paying increases during the freeze period and therefore this practice cannot be considered part of business as usual. As well, the union points out that Spar has made no similar proposal for retroactivity in the current set of negotiations.

10. A freeze provision complaint relating to salary increases was filed prior to the first collective agreement. SPATEA was successful in that complaint, as set out in the Board's decision, *SPAR Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859. A freeze provision complaint similar to the current one, but which also applied to the increases applicable to the scale itself, was filed in 1985. The parties' positions at that time were analogous to their positions before the Board on the complaint before us. The employer took the position that there would be no salary increases until the renewal of the collective agreement and the union took the position that the employees were entitled to salary increases according to the collective agreement during the freeze period. That complaint was settled with the union's withdrawal of the complaint at a time when the parties had reached agreement on the renewal of the collective agreement.

11. Mr Quittner explained the lack of objection to the company's non-payment of salaries increases during the freeze period in 1982. He said that set of negotiations was early on in the parties' history. It was not their expectation at that time that negotiations would take as long as they have each round. The issue was not elevated to a point of principle until it became a matter of concern in practice. Over time, as negotiations became protracted it became a sore point and the matter was challenged.

12. It is an agreed fact that no grievances have ever been filed over the company's failure to pay these increases during the freeze periods. Mr. Quittner testified that the reason that the union had not filed any grievances during the freeze period following upon the expiry of the 1985-86 agreement concerning the company's non-payment of maturity and promotion increases was that there was a prolonged strike by the Canadian Autoworkers Union (CAW) who represent a bargaining unit at SPAR. Mr. Quittner was concerned that grieving at that point in time would have led to an escalation and an inability to reach a negotiated settlement without a lock-out. The union wished to be as non-confrontational as possible without conceding its position on this point. The company emphasizes that the CAW's strike went from October 10, 1986 to February 1987; the collective agreement in issue expired on December 31, 1986, five or six weeks before the strike ended. Negotiations continued until September 16, 1987.

13. During the 1987 set of negotiations, which resulted in the most recently expired collective agreement, the employer tabled a variety of proposals aimed at clarifying the problem that had resulted in the 1985 complaint. Some of these were agreed to by the union and some were not. Specifically, the language relating to the salary grids as well as the heading of the last salary grid was amended to include end dates. When the union refused to agree to its positions on maturity and promotion increases, which would have provided that they only occurred during the term of the collective agreement, the company withdrew them without prejudice to maintaining its position on the matter, being that the previous collective agreement language supported its non-payment of salary increases during the freeze. In particular, the following language proposed by Spar was *not* agreed to by SPATEA:

43.0 Salary Increases

It is understood and agreed that the salary changes set out herein and the methodology described for their determination will operate for the period from the date of ratification to December 31, 1989. No changes to salaries will be made subsequent to December 31, 1989 as a result of the operation of this agreement. Without limiting the generality of the foregoing, it is agreed that this includes general performance, maturity and promotion increases all of which will cease on or before December 31, 1989 as provided herein.

14. In the 1987 negotiations, the company had also proposed the following wording about maturity increases:

The Maturity Increase shall be applied six (6) months from the employee's entry into the bargaining unit and subsequently each twelve (12) months of service thereafter *during the period up to December 31, 1989* adjusted by any periods of lay-off or approved leave of absence as provided in clauses 29.3 and 29.4 hereof.

SPATEA agreed to this clause once Spar agreed to delete the underlined words. Mr. Quittner believed that the basis of its refusal to agree to the underlined language was the fact that it would have conflicted with the deletion of the proposed Article 43.0 set out above, and weakened SPATEA's position.

15. Since the agreement to insert end dates described above, the union has not taken the position that increases to the grids themselves were payable during the freeze period. However, it has continued to hold the view that maturity and promotion increases were payable. The union made no counter proposals on these issues because it held the view that the existing language of the collective agreement supported the position that these increases were payable. As well, he was of the view that such a proposal would not properly belong to the old or the new collective agreement but would be in a grey zone between the two. Therefore he did not see it as appropriately a proposal for the new collective agreement.

16. Throughout the bargaining history between these parties, each party has been aware of the other's position on the question of increases during the freeze period. The witnesses acknowledged that the other party had never abandoned its position on the matter when it was addressed in negotiations. Explaining the company's withdrawal of its proposals on promotion and maturity increases in the most recent round of bargaining, Mr. Stewardson said that it did not seem prudent to take a strike on that matter although the company had made it very clear that it did not think it had to pay the increases even on the unamended language. Part of the reason for advancing the language changes was that Mr. Stewardson felt that the language in the expired collective agreement might not be perfectly clear to the "naive reader".

17. The company also took the position that the insertion of the dates ended all the other increases, including promotion and maturity increases. Equally, clearly, however, the Association disagreed with this. The company's view was that the recently expired agreement did not result in any increases after expiry. Mr. Stewardson cannot recall how explicitly the company put the position that the end date in Article 42.6 ended all increases of any kind during the freeze provisions. However, he was clear that it was part of the company's objective in proposing the changes referred to above. The company referred to them as "boundary conditions" at the bargaining table, meaning all of the proposals which referred to the term of the agreement. They included in particular the end dates added to Article 42.6 which relates to the last salary grid in the most recently expired collective agreement and 42.8 which relates to the performance increases, as well as the salary tables themselves. The discussion between the parties about the boundary conditions

took a total of more than ten hours of time at the bargaining table, spread over the course of various meetings.

18. Mr. Quittner does not recall Mr. Stewardson's ever saying that the salary scales disappeared at the expiry of the collective agreement. He was of the view that if such a position had been explicitly taken that he would not have agreed to include the end date wording, "to December 31, 1989", in Article 42.6. Had Mr. Stewardson said that the scales did not increase after the expiry of the collective agreement he would not have disagreed.

19. As to the company's understanding of the union's position after agreeing to the end dates, but not agreeing to the specific language about maturity and promotion increases, Mr. Stewardson said that the Association never advanced the position specifically that the maturity and promotion increases should continue. Rather, he said they disagreed with the language the company advanced and his sense was that they wanted their options open on all four types of increases.

20. For the first time in this round of negotiations no one has been promoted during the freeze. (This fact was not complained of in the complaint before us.) Everyone who has been recommended and approved for promotion has been informed of that fact, but the promotions themselves have not been implemented. As in previous rounds, no promotion increases have been paid either. In the most recent round of negotiations, the company did not make any specific proposal limiting the dates of promotion increases. Mr. Stewardson explained that promotion was in the company's control; by avoiding promoting people, they would not have to pay promotion increases.

Argument

21. The Association took the position that the rights of the Association as explained in the plain language of the collective agreement are frozen by section 79 of the Act. Counsel asked us to find that this was the content of business as usual and the reasonable expectations of an employee. Putting itself in the shoes of "average talented engineering or technical employees", the Association argues that their expectations are to be found in the wording of the collective agreement; there is no evidence that the average employee has information from the company that there will be no increases until negotiations are concluded. Mr. Green argues that once the end dates were inserted into Articles 42.6 and 42.8 the average employee would know that the scales are not to be increased during the freeze period and that performance increases will not be paid. However, it is argued that when employees turn to Article 43.2 and read the word "shall" that they would expect an increase six months from entry into the bargaining unit and yearly thereafter. It is mandatory language. It is argued that the same goes for promotions. They are in the discretion of the company but if they are given, the increases are to follow in the percentage amounts provided in Article 43.3 of the collective agreement.

22. As to the company's evidence on past practice, the Association says that there is no latent or patent ambiguity in Articles 43.2 or 43.3. There is no language which would imply they were not supposed to take place after the collective agreement expires. Mr. Green argues that given the company's acknowledgement that it knew that the union was not giving up its position as to the meaning of the collective agreement there could be no clear representation on which the company relied to its detriment as there would have been no basis for the reliance. Therefore there can be no estoppel. In any event union counsel submits that the expectation of employees cannot be affected by the company's estoppel argument.

23. Referring to the proposals not agreed to in the 1987 round of negotiations, Mr. Green says that the fact that SPATEA rejected the wording of the proposed Article 43 makes it clear that

the union was saying that promotion and maturity increases should be paid. The same goes for SPATEA's refusal to agree to the underlined part of the language set out above in the proposed Article 43.2. The union does not see this as a question of filling in ambiguities in the collective agreement. It sees it as a clear attempt by the employer to escape paying promotion and maturity increases after the expiry of the collective agreement, when the language which would have allowed this was rejected.

24. Furthermore, the Association argues that what happened in negotiations nullifies the prior history of the practice between the parties. If the Board finds that the conduct in 1982 and 1984 could have led the company into detrimental reliance, which the union has asked us not to, the negotiations in 1985 are very clear. There could be no reliance at that point on the union's inaction as the complaint was brought. In the next round the company ended up without the exact language it wanted and it was willing to take a chance on its interpretation of the language. The Association logically was relying on its interpretation of the language for maturity and promotion increases because it did not agree to insert end dates for those categories of increases. There was no complaint in 1982 because the union was relatively new. The union says there is no evidence of any statement, action or inaction which would have led the company to rely on the union's failure to complain at that time or at a later date, for example, at the expiry of the 1982-1984 collective agreement. There is no evidence that the reason the company did not pay the increases was something the Association did or did not do. What was clear was that in 1985 the Association came to the Board. Grievances were not filed but the equivalent or better action was taken. Although the union eventually withdrew the 1985 complaint, it did not give up its position or make any representation to that effect, and Mr. Stewardson was not under any illusion about that. Nor did the company make any parallel representation. Counsel suggests that if either side had pressed it there might have been no settlement. The union argues that the fact that the company was under no misapprehension as to the union's position was evidenced by its proposals in the next round. If it had thought that the Association had given up its position it would not have proposed the explicit language it did.

25. The union referred to an unreported arbitration award *Letter Carriers v. Canada Post Corporation* concerning the D. Nicholas grievance (July 6, 1989, M. G. Picher) on the question of estoppel as applied to statements made at the bargaining table. He asked us to adopt the view that estoppel cannot be based on mere factual assertions at the bargaining table. In counsel's view the evidence is simply insufficient to give rise to estoppel by silence or a mixture of practice and representation by inaction at negotiations.

26. The union then referred to the authorities of *W.H. Smith Canada Ltd.*, [1986] OLRB Rep. June 920, *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, *Simpsons Limited*, [1985] OLRB Rep. April 594 and *Scarborough Centenary Hospital*, [1978] OLRB Rep. July 679.

27. Counsel underlines that the original *Spar* decision has not been deviated from by the Board. The Association says that what is frozen is the salary tables and the right to be paid according to the tables as they existed on December 31, 1989 and the maturity and promotion increases which follow. He says in this respect the grid is not very different than other grids. The rate is increased at periodical intervals and then there is a rate which goes to the end of the agreement and that is what is frozen. He argues that if the company was correct that the scales disappear, no one would be paid according to any scale. He argues that the employees are continued to be paid what they were earning in December 31st according to the scales then in effect. He points to the fact that new employees are offered pay linked to the last salary scale. He says that the memorandum of agreement from the last negotiations also contradicts the idea that scales disappear. The

retroactivity proposal in that memorandum was worked out off the scales in existence prior to the end of the previous agreement. Over the years the basic salary structure has not been altered; rather there has been a scale with Pay Research Bureau data and percentages and control points. Although the union acknowledges that it may be frustrating to have to do calculations a second time, it argues that this is an insufficient reason to deny the complaint.

28. Mr. Green says the parties have never restricted the right to maturity and promotion increases by plain language. The employer has tried but the union has rejected the attempts. This is strengthened by the fact that in the previous round, Article 42.8 was restricted to limit performance increases to dates within the life of the collective agreement and not thereafter. Where the parties have addressed the end date in one area but not in another normal contract interpretation should result in the conclusion that it was not intended in the other area, in counsel's submission.

29. Counsel says that Mr. Stewardson's purpose in not wanting to pay these increases is contrary to the purpose of section 79 which is to prevent an employer from gutting the conditions of the collective agreement prior to the ability to strike.

30. Mr. Green asked the Board to remain seized as to the identity of people owed money and quantum if the complaint succeeds.

31. For the company, Mr. Burkett characterized the union's contractual interpretation argument as on the wrong track at the outset, that it would be more properly made before an arbitrator. Counsel submits that when viewed under the rubric of the three general principles of the Board's jurisprudence as to freeze provisions, the result would be different than the union's argument on the meaning of the collective agreement. These are: (1) business as usual (2) reasonable expectations from *Simpsons Limited*, *supra*, and (3) the totality of the employment relationship.

32. Counsel distinguishes *W. H. Smith*, *supra*, and the previous *Spar Aerospace* decision, *supra*, because they were first collective agreement situations and submits the Board ought not apply them to a renewal situation. He makes the point that even in *W. H. Smith* there is a reference to *Simpsons' Limited*, *supra*, and to *A. N. Shaw Restorations Ltd.*, [1978] OLRB Rep. June 479, in which a union was held to have waived certain rights under its collective agreement and was not allowed to adopt a different posture during the freeze period.

33. Counsel argues that in a renewal situation although one relies fairly heavily on the collective agreement it is not to the exclusion of other provisions or rights or privileges that may arise. This is consistent with looking at the totality of the collective agreement. In *Simpsons Limited*, *supra*, the Board recognized a distinction between a first collective agreement and a renewal agreement and said that in bargaining for a renewal agreement employer privileges may be found.

34. Counsel argues that the back drop to this dispute is critical and makes it a much different situation than at the time of the first freeze provision complaint by SPATEA. Now mature history between the parties applies to the scales and more importantly to the four fold salary increases. He invites us to look at page 867, paragraph 18, of the previous *Spar Aerospace* decision, *supra*, where the Board stated:

What the statutory freeze does is simply maintain the totality of the employment relationship in the pattern existing at the time the freeze becomes effective, whether it be a pattern established by prior dealings on an individual basis or prior dealings on a collective basis, making it the starting point for negotiations.

He refers to *Simpsons Limited*, *supra* on the subject of employer privileges as well as *Coca-Cola Ltd.*, [1989] OLRB Rep. May 427.

35. Counsel stresses that this is a twelve year old relationship and the full relationship has been canvassed in evidence. We are referred to *Anderson's City Farm Value-Mart*, [1987] OLRB Rep. Jan. 1, at paragraph 6 and to *Forintek Canada Corp.*, [1986] OLRB Rep. April 453 at paragraph 40, to support the proposition that the collective agreement may not contain the full prior relationship to be frozen. The evidence as to how the parties have handled maturity and promotion increases in the past is therefore central. If the union's argument succeeds, the employees would get salary increases for the first time ever during a freeze period. He argues that this is inconsistent with the whole purpose of the freeze. In the same vein is the *Etobicoke General Hospital*, [1986] OLRB Rep. May 614 which states that where there is conflict between the collective agreement and a historic pattern of payment, the historic pattern prevails. It creates a privilege. In *Ontario Hydro*, [1983] OLRB Rep. Sept. 1536 the Board found that privileges outside the framework of the collective agreement which can be demonstrated to be an accepted part of the employee/employer relationship are also frozen. In *A. N. Shaw Restorations Ltd.*, *supra*, the Board held that the union had waived certain rights and that the day to day relationship is not necessarily to be found in the collective agreement. The prior pattern is to be assessed as the collective agreement within the context of the whole relationship.

36. Mr. Burkett stressed that the employer is not saying that it could not succeed on the contractual analysis. He argued that the collective agreement starts earlier than the document which is called the collective agreement and is composed of a memorandum of agreement and ratification. In every set of negotiations, the issues as to salary increases have been dealt with during the freeze period by retroactivity at the end of it. It is clear from the memorandum of agreement which was the basis of the most recent collective agreement that retroactivity was a major component of the collective agreement as defined in the *Labour Relations Act*. On this basis he says that we should find that even if it is correct just to look at the collective agreement we should find that the issues of salary increases are all dealt with retroactively and that is the pattern to be frozen. Every succeeding collective agreement has started the day after the expiry of the proceeding agreement. He asks us to decide as in *Coca-Cola Ltd.*, *supra*, that timing is the question. These parties have spoken to timing repeatedly. On the employer's analysis, the union has accepted no salary increases during bargaining from the 1981-1982 collective agreement to the present. Counsel asserts that the level of inactivity from the union in this regard is telling and should be determinative. There are also no grievances in ten years and no proposals in the face of a clear consistent general approach from the company. Furthermore in 1987 there was an array of clarifying proposals under the general heading of boundary conditions. Again there are no counter proposals and no complaints. The only exception to the acquiescence of the union is the 1985 complaint. What the parties agreed to was consistent with past practice. It was implemented by retroactivity in accordance with the new rules on maturity and promotion increases agreed to at the table. The employer says that the union could have gotten a declaration from the Board but did not ask for it. There were negotiations over ten months in 1987 with no complaints nor grievances. The pattern is to deal with salary increases retroactively. Mr. Burkett argues that the union is asking the Board to depart from a well established relationship on the issue of salary increases.

37. Furthermore, he argues that the 1987 negotiations do not extinguish the prior pattern. It is not a watershed, but further clarification of the totality of the bargaining relationship. The union accepted two of the company's proposals on boundary conditions. Counsel also asked us to reject as unimportant the union's remarks about the CAW strike as for eight of the ten months of negotiations there was no CAW strike.

38. As to reasonable expectations Mr. Burkett makes four points. (i) the overriding past practice is that the employees have never received the disputed increases during the freeze. How would they expect them? (ii) the December 15th letter was an announcement that history would

repeat itself. (iii) employees probably do not establish their expectations on the basis of collective agreements but if so they would find end dates this time when they read it. (iv) new hires do not get salary increases during bargaining. (v) There have been no grievances; expectations would have worked their way into filing of grievances if they were so strong.

39. In reply as to *A. N. Shaw Restorations Ltd.*, *supra*, Mr. Green distinguishes it factually. He says that the past history of union inaction in that case in the face of breaches of the agreement gave rise to a practice which could be frozen as it would have been unreasonable to suggest that the employment relationship was otherwise. By contrast Mr. Green argues that SPATEA had taken no position in bargaining that could leave the employer in doubt about what its position was concerning the relevant issues. Mr. Green characterizes the prior pattern as one of dispute between the parties with no real resolution. Mr. Green submits that the company should not gain by its prior improper conduct if it was aware that the Association did not condone it.

40. Mr. Green also distinguishes *Anderson's City Farm*, *supra*, on the basis that it dealt with an employer's right rather than the obligation to pay merit and promotion increases during the collective agreement as in our case.

Decision

41. The purpose of the freeze provisions was set out succinctly in *A. N. Shaw Restorations Ltd.*, *supra*, at paragraph 9 as follows:

It has long been held by this Board that the purpose of the Section 70(1) [now 79(1)] freeze, which maintains the status quo in respect of "wages or any other term or condition of employment or any right, privilege or duty" is to facilitate the bargaining process by providing a fixed point of departure and a period of tranquillity and stability in which to commence and hopefully conclude negotiations for a collective agreement.... The task which confronts the Board in these matters, therefore, is to determine the component elements of the status quo as of the date the statutory freeze took effect and to assess the change or alteration which is complained of against this fixed point of departure.

42. In other decisions the Board has articulated the tests for applying this purpose to particular facts as determining what is "business as usual", or the "reasonable expectations of the employees" or the "totality of the employment relationship". See *Simpsons' Limited*, *supra*, among others. As is clear from all the authorities on the subject, however, it is easier to state the tests for what is frozen than to apply them to the facts of any given collective bargaining relationship.

43. The key to resolving the dispute before us is the determination of the proper frame of reference for the application of the above tests. What period of time should be used to measure "business as before", or the "reasonable expectations of employees", or "the totality of the employment relationship"?

44. What is novel about the facts of this case is that the issue exists with regard to events that took place *only* during freeze periods. None of the above authorities deals with a similar set of facts. Perhaps the closest is *Etobicoke General Hospital*, [1986] OLRB Rep. May 614, which dealt with a situation in which the employees concerned had been hired during the freeze, and the only pattern to their employment relationship as individuals had occurred during the freeze, which was a particularly long one. The Board there said that one should look to the practice during the subsistence of the collective agreement as well as after its expiry. This is the case which is the source of the statement relied on by the employer that where there is a conflict between the collective agreement and an historic pattern, the pattern prevails. The facts involved a situation in which the com-

plaining employees had been paid more generously than the collective agreement provided from the beginning of their employment relationship, and others had been similarly paid during the currency of the collective agreement. The employer reverted to the strict terms of the collective agreement. The employees were found to have a privilege of being paid according to the practice, and thus the employer was not permitted to change its practice during the freeze. What is different about the facts of *Etobicoke General Hospital* when compared to the facts of the case before us is that the practice was the same both during and after the expiry of the collective agreement and therefore the issue of whether prior freeze periods were an appropriate frame of reference did not arise. In the facts before us the practice was different during the currency of the collective agreements than after their expiry. Therefore, the question is squarely raised as to whether the previous freeze periods are frozen along with, or instead of, the practice during the life of the collective agreement. Similarly *A.N. Shaw, supra*, was a situation in which the union tried to enforce a term of the collective agreement for the first time during the freeze, having failed to do so during the currency of the collective agreement. The employer's practice had not varied between the life of the collective agreement and the freeze periods.

45. Section 79(1) starts with the wording "Where notice has been given under section 14 or section 53 and no collective agreement is in operation..." We are directed to the point in time at which the collective agreement ceases to be in operation - its date of expiry. Many of the Board's decisions concerning the application of the freeze provisions speak of determining what the employment relationship contains as of the expiry of the agreement. See, for example, *A. N. Shaw, supra*, at paragraph 15. The analysis in that case suggests that an appropriate approach is to ask whether the claim could have successfully been asserted at the expiry of the collective agreement. It is inherent in the scheme of the Act that the freeze period, after the first collective agreement has been concluded, is intended to preserve the employment relationship as it is changed from time to time, either by collective bargaining or by changes in practice that are not regulated by the collective agreement but which are sufficiently established to be terms and conditions of employment, or rights, privileges or duties of either party. When the matter relates to rates of wages, a subject dealt with by the collective agreement, and ordinarily bargained about in each round, it is most consistent with the scheme of the Act to start the inquiry with the most recent set of terms and conditions between the parties. This respects the Act's rhythm of freeze period, negotiations and subsequent collective agreements, which bears the potential for change in each new round. See also *Sunnybrook Foods Limited, supra*, at paragraph 11.

46. There really is no issue of contractual interpretation during the currency of the collective agreement. It is common ground that the practice during the term of the collective agreement was to pay maturity and promotion increases as set out in the collective agreement. Promotion increases were paid when promotions were given and maturity increases were paid six months from entry into the bargaining unit and annually thereafter. There was no evidence to suggest that there was any deviation from that pattern except during the freeze periods. This is not a case like *A. N. Shaw, supra*, where the union was not enforcing a term of the collective agreement during its currency in the face of an employer practice to the contrary. In the absence of the practice during the freeze period, then, it would be clear what was frozen, and the complaint should be upheld.

47. Should the frame of reference for the application of the freeze provisions include the practice during the previous freeze periods? Do the freeze provisions capture the practice during the interregnum between collective agreements? It is clear that the general rule in a collective bargaining relationship is intended to be governance by the terms of a collective agreement. On a general theoretical level, then, the correctness of defining the totality of the employment relationship, the reasonable expectations of employees, or business as usual solely according to the practice during the periods of exception to the rule, when there is no collective agreement in operation, when

that differs from the practice during the life of the collective agreement, is not immediately obvious.

48. More specifically, the Board has made it very clear that expiry dates in a collective agreement do not indicate that what is frozen is a blank page because all the terms have expired. Normally, what is frozen is what existed prior to the expiry. See for example the following excerpt from *Molson's Brewery (Ontario) Limited, Toronto*, [1977] OLRB Rep. Aug. 526 at paragraphs 7 and 8:

... As the Board noted in the *Kodak* case, *supra*, what appears to be contemplated by section 70(1) [now 79(1)] is a total freeze of all the legal incidents of the collective bargaining relationship between the parties until such time as either a new collective agreement is negotiated or the parties become entitled to resort to economic sanctions. Such an approach, in turn, means that the operation of the various provisions of the collective agreement is extended until such time as the force of section 70(1) is spent.

8. That the legislature contemplated a continuation of the collective bargaining relationship during a section 70(1) freeze is, we feel, strongly indicated by section 70(3) [now 79(3)]. This subsection stipulates that where notice to bargain has been given under section 45 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) was complied with may be referred to arbitration "as if the collective agreement was still in operation". It is worth noting in this regard that boards of arbitration have taken the position that because of sections 70(1) and 70(3) grievances filed during a freeze period following the expiring of a collective agreement can be brought forward to arbitration for determination as if they had been filed during the life of the agreement itself. [See *Berlet Electronics Ltd.* (1968) 19 L.A.C. 152 (Weatherill), *David Barry Co. Ltd.* (1968) 19 L.A.C. 157 (O'Shea) and *Truck Crane Service Ltd.* (1973) 4 L.A.C. (2d) 250 (O'Shea)].

Also see *Kodak Canada Ltd.*, *supra*. and *Sunnybrook Foods Limited*, [1985] OLRB Rep. Feb. 337, for situations in which language purporting to confine payments to the term of an expired collective agreement did not remove the affected terms from the reach of the freeze provisions. This well established jurisprudence is sufficient to dispose of the employer's position, articulated in evidence, that the salary scales cease to exist and that one cannot carry out the salary administration scheme without the salary scales. The jurisprudence also counters the idea that the role of the freeze provisions is markedly different in regards to salary increases prior to the first collective agreement as compared to the periods between collective agreements. Although *W.H. Smith*, *supra*, which held that the employer's previous practice of paying annual increases was frozen, involved a freeze prior to the first collective agreement, similar results have pertained in the renewal situation. See *Forintek Canada Corp.*, *supra*, at paragraph 40 as well as *Sunnybrook Foods Limited*, *supra*.

49. Does the practice of the employer in this case during the freeze periods have sufficient weight to define a pattern that should be frozen which is different from the one that is agreed to pertain during the currency of the collective agreement? Do the facts of this case establish an employer privilege of not paying wage increases during the freeze, as argued by the employer? The practice of the employer was consistent during past freezes, as to salary increases: none of any kind have been paid. The evidence also shows that there was much other activity around this issue.

50. In the freeze period prior to the first collective agreement, the employer's failure to pay increases was successfully challenged with a freeze provision complaint. In the second freeze period, the practice was not challenged, and retroactivity covered the issue. In the third freeze period, there was a second freeze provision complaint, which was settled at a time when the issue had become moot, because the collective agreement, which included full retroactivity, had been settled. In the fourth freeze period, the parties turned their minds to the employer's proposals on

the subject. The practice during that freeze was not otherwise addressed by the union; no grievance or freeze provision complaint was filed. The union now agrees that the employees are not entitled to general scale increases during the freeze because of the specificity of the dates inserted in the most recent round of bargaining. The employer's proposals which would have inserted similar language into the promotion and maturity increase provisions of the collective agreement were not agreed to by the union. At the very latest, by the time of the 1985 freeze provisions complaint, the employer was aware that the union did not agree with its interpretation of the collective agreement during the freeze periods. That the parties did not agree on the general issue of pay increases during the freeze was evident from before the first collective agreement was concluded. As the matter was not characterized as one for the application of estoppel by the employer in argument, we need not comment on the union's arguments on estoppel.

51. If one tries to capture the totality of the employment relationship during the earlier freeze periods, the common threads are failure to pay increases and failure to agree on whether that was appropriate. Formal objection to the practice occurred in the first and third freeze periods, and the union's position was demonstrated to the employer, and changed as to scale increases, at the bargaining table in the most recent round of bargaining. Is this sufficient to create an employer privilege of not paying maturity and promotion increases during the freeze period in contrast to the application of the collective agreement during its term? We do not think this is the case. Firstly, the practice was clearly challenged in 1985. We do not think that the fact that the union did not pursue the matter when the issue was moot can be held against it. It is not usually considered desirable for labour relations to pursue issues in theory that have been resolved in practice. Secondly, and more importantly, at the next opportunity, the bargaining table in 1987, the parties changed the terms and conditions of employment to be frozen at the expiry of the resulting collective agreement. Had there been any doubt to whether the Association accepted the company's interpretation of these provisions before then, there was none after this point. The only practice under the new terms was during the currency of the new collective agreement. For the current freeze period, even if we consider the issue independently of the agreed practice during the currency of the collective agreement, we are of the view that the provisions of articles 43.2 and 43.3 are clear. The payment of the increases is linked to the date of the employee's entry into the bargaining unit in the case of maturity increases and to the date of promotion in regards to promotion increases. They are not linked to the specific dates in the salary scales or in Article 42.8 relating to performance increases.

52. The employer underlined that if the Board upheld the complaint, employees would be receiving increases during the freeze period for the first time, and thus such a decision could not be said to be consistent with the reasonable expectations of employees. As the Board said in *Coca-Cola Ltd.*, *supra*, the reasonable expectations of employees has an objective component. Otherwise, an individual's peculiar expectations could dictate the result in any freeze complaint. What is reasonable in an objective sense obviously depends on what approach one uses. And equally obviously, reasonable people may differ. For example, an employee who had been hired during the life of the last collective agreement would be quite reasonable in thinking that maturity and performance increases would be paid at the intervals set out in the collective agreement. Another employee, fully informed as to the history of this collective bargaining relationship, whose attention had been drawn to the reasons for the lack of a promotion or maturity increase during one of the past freezes for which she was aware she was otherwise eligible, might have an entirely different but equally reasonable expectation.

53. The same is true for the other tests in the Board's jurisprudence business as usual and the totality of the employment relationship. If one includes past freeze periods in the frame of reference, as evidenced by the able argument of both counsel in this case, one can describe the facts

in a way that fits into the wording of the section, on either side of the argument. In this regard, the employer argued that the totality of the employment relationship includes the practice during the freeze periods, and that as stated in *Etobicoke General Hospital, supra*, where practice is at odds with the collective agreement, the practice should prevail. As noted above, however, that case dealt with a practice during the life of the collective agreement. There is no authority of which we were made aware for the proposition that a practice during previous freeze periods should override the practice under the provisions of the collective agreement during its currency. In the factual circumstances of this case, such an approach does not fit well with the purpose of the freeze provisions, which is to provide a fixed point of departure for each successive set of negotiations. In any event, the practice during past freeze periods could not be said to be an "accepted part of the employment relationship" as the only round of bargaining in which the union did not assert the contrary in some form was the 1982 round.

54. Mr. Burkett also argued that the company's position was supportable on the definition of collective agreement contained in the Act, which is as follows:

1.-(1) In this Act,

- (e) "collective agreement" means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement;

Counsel argues that the collective agreement thus defined includes the memorandum of settlement which was entered into evidence. As noted above, it includes full retroactivity back to the date of the expiry of the previous collective agreement. Theoretically then, even during the currency of the collective agreement, the parties dealt with maturity and promotional increases by retroactivity and not by paying them prior to the conclusion of the renewal collective agreement. In considering this argument we observe there is a certain amount of legal fiction in both retroactivity provisions and in the freeze provisions. A retroactivity provision acts as if the present state of affairs existed in the past. The freeze provisions are intended to direct parties to act as if the terms and conditions of employment which expired with the collective agreement had not expired. But neither fiction changes the reality that the interregnum is not the currency of either the expired or the renewal collective agreement. The parties are in partially suspended animation awaiting the settlement of the disputed terms and conditions of employment. Mr. Burkett may be correct that at the moment of signing the document put into evidence as the collective agreement between the parties, which does not contain the retroactivity language of the memorandum of settlement, the collective agreement as broadly defined in the Act also included the memorandum of settlement. Certainly for enforceability that ought to be correct. However, this does not really assist in the resolution of this dispute because prior to the signing of the memorandum of settlement, it was s. 79(1) and the terms and conditions of employment as of the date of the expiry of the previous collective agreement, and not the still to be signed memorandum of agreement, which governed the relationship between the parties. The same is true of the current freeze period. The fact that the employer had not, at the time of the hearing, proposed any retroactivity demonstrates that it does not feel it is bound in bargaining by the retroactivity provisions of past settlements. It would be directly at odds with the whole purpose of periodic renegotiation of collective agreements to bind either party during negotiations by its positions in previous rounds of bargaining. It is our view that giving effect to this portion of the company's argument would be to hold parties bound by their retroactive treatment of a prior freeze period when faced with the next one. This would not likely be a welcome

concept to either party if applied more generally than to the peculiar facts of this case, and is not one the Board adopts.

55. In the result the complaint is upheld. The Board finds that the employer violated section 79(1) of the Act by failing to pay promotion and maturity increases during the freeze period according to the provisions of the expired collective agreement. The Board will remain seized if the parties are unable to agree on compensation and to deal with any difficulties in implementation.

DECISION OF BOARD MEMBER JAMES A. RONSON; March 27, 1991

1. This is an application by the union for a contractual interpretation that certain terms of a collective agreement extend beyond the expiry date of the agreement. The result is that the *status quo* in the terms and conditions of the employment relationship between employer and employees will change during the “freeze period” of bargaining. By the decision of my colleagues the Board grants to the union that which it was unable to obtain during 10 years of collective bargaining with the employer.

2. The parties have developed an intricate and sophisticated system for the review of the salaries of its scientists, engineers and technical personnel. At fixed dates every six months during the term of the collective agreement the salaries of the workers are reviewed and upgraded according to this intricate performance evaluation system. The contract has now expired and the parties are bargaining for a new agreement. Six months of bargaining have gone by and the union now asks the Board to order the employer to make the normal six month salary increase as found in the expired contract.

3. The onus is on the union to show why the Board should find that salary increases are part of the terms and conditions that are frozen in place during the bargaining freeze. According to the well-established criteria laid down by the Board, the union must show:

- (a) a reasonable expectation by the employees that they will receive a salary increase; or
- (b) a promise by the employer to make the salary increase; or
- (c) a pattern of previous salary increases during the bargaining.

4. Applying the evidence to the criteria, *seriatim*:

(a) Reasonable expectation of employees

The employees have never received such salary increases in the past. The employer has always denied the union's request for such increases. Previous contract settlements have provided for retro-active pay increases. All the evidence counters the notion that the employees could reasonably expect the employer to continue making salary increases after the end of the contract.

(b) Promise to pay by the employer

The evidence is that the employer has always taken the position that salary increases do not out-live the contract. During the last round of bargaining the contract language was tightened to make it even

clearer that the employer had no intention of granting such increases.

(c) A pattern of previous salary increases

Go back to (a) and (b)

5. Simply put, the union has failed to meet the onus set by previous cases of the Board and I would dismiss this application.

6. There is one further element of this case that requires comment. Under the guise of determining the terms and conditions of employment during the freeze period, the Board has assumed the mantle of a board of arbitration and interpreted the terms of the collective agreement. It has ignored past practice and the collective bargaining pattern which evolved between the parties over some 10 years. It has given the union that which it wanted but could not obtain in bargaining. I can only hope that it has not sent the present lengthy round of negotiations and the mature bargaining relationship between the parties back to year no. 1, square no. 1.

[Appendix omitted: Editor]

1686-89-U Windsor Printing Pressman and Assistants' Union, Local 274, Complainant v. Sumner Press Ltd., Respondent

Evidence - Practice and Procedure - Plant manager discharged after testifying for employer - Union seeking to call plant manager as its witness in reply - Union counsel not ascertaining whether witness would recant earlier testimony but inviting Board to hear him anew so that it could weigh his credibility and that of other witnesses - Board ruling proffered evidence not proper reply evidence

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

DECISION OF THE BOARD; March 18, 1991

1. This is an evidentiary ruling in a proceeding filed by the union pursuant to section 89 of the *Labour Relations Act*. The details of the complaint need not be set out here. It suffices to say that the union's allegations focus on the employer's collective bargaining strategy and bargaining positions which the union contends were undertaken "in bad faith", with a view to eliminating the union presence from the workplace.

2. Given the nature of the case, the union proceeded first, calling such evidence as it considered necessary to establish the basis for its claim. The company responded with three witnesses who testified about the course of bargaining, the employer's bargaining strategy, and the financial concessions which the company hoped to achieve at the bargaining table. One of those witnesses was Kai Freis who, at the time, was Plant Manager and a member of the company's bargaining committee. Mr. Freis was examined at length by counsel for the company, then cross-examined, at

length, by counsel for the union. As is customary in Board proceedings, the evidence was given under oath.

3. After the company had closed its case, the matter was put over, on the agreement of the parties, to a later date when the Board reconvened to entertain the union's reply evidence. The union indicated its intention to call Mr. Freis as *its witness* in reply. The company objected, however, the Board ruled that (at that stage) such objection was premature. There is no general rule of evidence that a witness that has been called once cannot be called again, nor is there any rule preventing a union from calling a company witness to give "reply evidence" - provided the evidence is otherwise relevant and proper "reply".

4. As it turned out, however, there was a problem with the evidence sought to be led through Mr. Freis. Counsel for the union indicated that Mr. Freis would be called "in reply to himself". We were told that, since giving his evidence, Mr. Freis' employment with the company had been terminated and that, accordingly, Mr. Freis might now be disposed to give a more complete, candid, and credible version of events than he had done before. Counsel advised the Board that he had *not* spoken to Mr. Freis at all about his evidence, nor had he ascertained whether Mr. Freis would, in fact, recant or contradict his earlier testimony - counsel merely suggested that Mr. Freis might be disposed to do so as a result of his discharge. Counsel did not identify any fact or particular episode in the bargaining to which Mr. Freis' "new evidence" might be directed, or which might be clarified or rebutted by what Mr. Freis might now be inclined to say about his former employer. Counsel simply invited the Board to hear Mr. Freis anew so that it could weigh both his own credibility and that of the other company witnesses with whom he had first given evidence.

5. The Board (by a majority) declined to do so. In our view, this was not "reply evidence" at all but rather a request by the union to reopen its cross-examination of Mr. Freis so that it could embark upon a "fishing expedition" to see if he might now repudiate factual assertions he had previously advanced. Counsel could not say how or in what way that evidence would be any different - only that it might be, and if it was, that might be relevant to the credibility issues before us. Despite counsel's novel suggestion that Mr. Freis was being called in reply "to himself", we did not think that this was proper reply evidence, and there was no other foundation advanced which would warrant hearing further from Mr. Freis on matters about which he had already been examined and cross-examined at some length.

6. We also note counsel's submission that if Mr. Freis were heard, it would be open to the company to demand a further "reply" to recall its witnesses if anything new, or startling did emerge from Mr. Freis' further testimony. Counsel asserted that this second reply would eliminate any prejudice to the company if it was caught by surprise by anything Mr. Freis said. On this theory of "reply evidence", litigation would be never-ending.

7. Board Member Armstrong would have received Mr. Freis' testimony, reserving as to the weight (if any) which should be given to it, at the end of the day.

1790-90-U Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, Complainant v. Toronto Star Newspapers Limited, Respondent

Discharge - Unfair Labour Practice - Employer and grievor disputing propriety of grievor submitting brief to Commission of Inquiry - Employer requiring grievor to agree to certain conditions or face discharge - Grievor accepting conditions, but insisting on right to refer issue to arbitration - Grievor discharged - Whether unfair labour practice - Board determining that grievor discharged for reasons unrelated to his attempted exercise of right under the Act to grieve - Complaint dismissed

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *J. A. Ronson* and *E. G. Theobald*.

APPEARANCES: *H. Goldblatt*, *B. Petrie* and *A. Story* for the applicant; *H. Freedman*, *C. J. Davies* for the respondent.

DECISION OF THE BOARD; March 28, 1991

1. This is a complaint filed pursuant to section 89 of the Ontario *Labour Relations Act* in which the complainant (also referred to as the “union”) alleges on behalf of Alan Story (also referred to as the “grievor”) that the respondent (also referred to as the “employer” or the “Star”) has violated sections 3, 64, 66(a) and (c), 70 and 80 of the Act.

2. Those sections provide:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

• • •

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act,

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

80.-(1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten dismissal or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

- (a) discriminate against a person in regard to employment or a term or condition of employment; or
- (b) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

3. The grievor has been employed by the Star as a reporter for approximately 7 years prior to the events giving rise to this complaint. It was acknowledged that he was more than competent at his duties. Most recently he had worked as a Queen's Park reporter and was subsequently assigned to the special investigative team. In or about the spring or summer of 1990 the grievor requested and was granted a leave of absence. The leave was granted to allow the grievor to commence the studies at law school he is currently undertaking. It was understood that he would return to work for the employer as a general reporter in May of this year; the leave granted was for a period of one year.

4. Prior to commencing his leave the grievor had written a number of stories regarding the handling of personnel matters by the Metropolitan Toronto Police. It would appear that these stories in fact contributed to the decision taken to appoint a Commission of Inquiry (hereinafter the "Commission") to investigate these matters.

5. On September 4, 1990, the grievor gave Joe Hall, the employer's City Editor, a copy of a 34 page brief he had prepared. The brief, which was not filed as an exhibit in these proceedings, apparently includes published and unpublished material gathered by the grievor. Mr. Hall showed a copy of the brief to John Honderich, Editor of the Star, and advised him that the grievor had indicated that the brief had been filed with the Commission, and that the grievor was giving the employer 3 days to review the material before he would release it to other media outlets.

6. Mr. Honderich felt the issue involved the very integrity of the newspaper and was extremely concerned. He spoke to the grievor that afternoon. In their discussion, the grievor confirmed that the material had been filed with the Commission. Mr. Honderich disagreed with the grievor's assertion that he was acting merely as a private citizen and provided him with two options: retrieve the brief or resign from his employment and file the brief as a private citizen. The

grievor disagreed with Mr. Honderich's assessment of the possible options but an agreement was reached to discuss the matter further at a meeting the following Tuesday.

7. At this juncture, Mr. Honderich was considering disciplinary action.

8. The scheduled meeting convened on September 11, 1990 with the grievor, Mr. Honderich, Ian Urquhart, the Star's managing editor, and Joyce McKerrow, a union representative, all in attendance. It quickly became apparent that there was a difference of opinion between, on the one hand, the grievor and the union and, on the other, the employer, regarding whether the grievor's conduct constituted a violation of the collective agreement or the employer's conflict policy or otherwise constituted grounds for disciplinary action. In response to a question from the grievor, Mr. Honderich indicated he was considering discipline up to and including discharge. The grievor then advised that the brief had not in fact yet been delivered to the Commission. Although Mr. Honderich was somewhat skeptical about this piece of information at the time, he conceded, in his evidence before us, that to his knowledge the brief has not been filed with the Commission nor disseminated to any person he would view as inappropriate.

9. Once the grievor had indicated the brief had not been filed Mr. Honderich gave him a variation of his earlier proposed options - the grievor could resign his employment or not file the brief. The grievor indicated he needed time to consider his position and agreed that he would get back to Mr. Honderich by Friday, September 14 and also agreed that, in the interim, he would not release the brief to anyone.

10. The grievor did not get back to Mr. Honderich as promised and their next conversation was not until the following Thursday when Mr. Honderich contacted the grievor by phone.

11. Mr. Story indicated that he needed more time (1-2 weeks) to consider his position. Mr. Honderich said that was totally unsatisfactory and he was not prepared to allow the matter to sit for that long. Mr. Honderich said the grievor would have to sign a document promising not to distribute or discuss the brief to or with anyone and that, in view of the recent events, he could have no further involvements with stories relating to the police.

12. In response to the grievor's question about the consequences of non-acceptance of these conditions Mr. Honderich indicated, without specifying, that further measures would follow. When Mr. Story indicated that it would be impossible for him to attend a meeting Mr. Honderich was attempting to arrange for the following day, the latter "terminated" the call.

13. At this point Mr. Honderich was so furious with what he viewed as the grievor's inappropriate conduct and obfuscation that he was ready to discharge him.

14. Mr. Honderich then met with Chris Davies, the Star's Director of Industrial Relations and Mary Deanne Shears, the Assistant Managing Editor, Personnel. Although Mr. Honderich continued to feel that the grievor ought to be terminated, by the end of the meeting a consensus was reached to give the grievor "one more chance" to meet the conditions in order to avoid termination.

15. As a consequence a four page letter signed by Mr. Honderich was delivered to the grievor the following day. The letter recounted the events to date and concluded as follows:

Consequently, you must understand that the only conditions on which the employment relationship can continue are as follows. I want in writing from you a statement that you fully subscribe to the conflict of interest provisions of The Star's Policy Guide and a pledge that you will not reveal verbally or in writing to any outside person or organization any of the material contained

in your report. You should also understand that because of your actions you will not be permitted at The Star to write any stories concerning police activities, should you decide to provide the statement.

You have had long enough to consider this situation. It is not a question of law, but rather one of journalistic policy which is fundamental to maintain the integrity of The Star. Thus I require that this written statement be delivered to me no later than 10 a.m. the morning of September 25. You should also understand that failure to provide the statement by the time requested will mean the termination of your working relationship with this paper.

Alan, you have had a long and successful working relationship with The Star, it would be a tragedy for it to end on such an issue. I would hope that you would think very deeply before committing [sic] an error I am sure you would live to regret.

16. On Monday, September 24 the grievor and Joyce McKerrow met with Bill Petrie, the union's local representative, and with union counsel to discuss the matter. At that meeting it was decided that the grievor would (at least provisionally) accept all of the conditions set out by the employer. In conjunction with that acceptance it was proposed that the parties agree to an expedited arbitration process to determine whether the grievor's actual or proposed conduct violated the collective agreement or otherwise formed the basis for the imposition of discipline. Expedition in the process was important so as to preserve the possibility of a timely submission of the brief in the event the union and the grievor were successful at arbitration.

17. Although both Mr. Honderich and Mr. Davies denied being apprised of this proposal in any fashion other than the grievor's subsequent written reply, Mr. Petrie's uncontradicted evidence indicated that the entire proposal was outlined to Mr. P. Dawson, the employer's Labour Relations Manager, on September 24. Mr. Dawson told Mr. Petrie that he would try to contact Mr. Davies or Mr. Honderich. Mr. Dawson did contact Mr. Honderich and secured his agreement to extend the deadline for the grievor's response to September 25 at 2 p.m.

18. On September 25, 1991 the grievor's response was delivered to the employer. It reads as follows:

I am writing in reply to the conditions for my continued employment at The Star which you set down in your letter of Sept. 21, 1990.

During discussions earlier today between Bill Petrie of the Newspaper Guild and a representative of the industrial relations section of The Star, the two parties discussed the possibility of using the grievance / arbitration process to resolve the conflict over my proposed submission to the Ontario Police Commission.

Without prejudice to my position and reserving the right set out in The Star/ Newspaper Guild collective agreement to file a grievance over the various issues at stake, I am prepared to agree to the following conditions of employment:

- 1) Based on the assumption that this matter will be decided by the arbitration process, I will not submit my report on the activities of Metro Police to the Ontario Police Commission's public inquiry or to any media outlets pending the outcome of this process.
- 2) I will abide by the provisions of The Star's Policy Guide providing they do not conflict with the provisions of the collective agreement.

I hope this letter addresses the essence of your concerns and provides an interim solution to this problem.

19. The terms of the grievor's proposal were the subject of some discussion between Mr. Petrie and Mr. Davies that day. Mr. Petrie suggested that the grievor and the union were propos-

ing to follow the “obey now and grieve later” rule i.e. to have the grievor comply with the Star’s conditions unless and until an arbitrator ruled in his favour. Mr. Davies didn’t feel the situation was one amenable to the rule since the employer felt the grievor’s conduct had already jeopardized his continuing employment. He expressed doubts that the proposal would be acceptable to the Star and indicated that if the grievor wanted to arbitrate the matter he could do so in the context of a discharge grievance. Mr. Davies said a formal written reply would be forthcoming since the ultimate decision was Mr. Honderich’s.

20. Mr. Davies then met with Mr. Honderich who was clearly not content with the grievor’s proposal. Mr. Honderich felt that while he had demanded a pledge not to “reveal verbally or in writing to any outside person or organization any of the material contained” in the brief, the grievor had only undertaken not to submit the report to the Commission or to any media outlets. Similarly, while Mr. Honderich had sought a written statement that the grievor fully subscribed to the conflict of interest provisions of the Star’s Policy Guide, the grievor had only undertaken to “abide by the provisions of the Star’s Policy Guide providing they do not conflict with the provisions of the collective agreement”. Mr. Honderich viewed this latter position as a challenge to the very existence of the Policy rather than simply a challenge to the extent of its applicability to the grievor’s actual circumstances. Finally, the overriding condition that the grievor’s acceptance of the Star’s terms was subject to arbitration was unacceptable. Indeed Mr. Davies’ view was that acceptance of the grievor’s proposal might result in 2 separate arbitration hearings rather than the complete and immediate resolution the employer was seeking.

21. By letter dated September 26, 1990 Mr. Honderich wrote (in part) to the grievor as follows:

... the commitments you are prepared to make, subject to the key provision that we submit this whole matter to arbitration, are simply not acceptable and do not meet the standards set out in my letter of September 21. The issue of conflict of interest is an essential part of both the Policy Guide and the Collective Agreement and its observance is essential if the integrity of this paper is to be maintained. In fact, acceptance of this policy is an integral part of working as a reporter at this paper... Our position remains that you must fully subscribe to the Policy Guide, without conditions, as to both conflict of interest and disclosure.

In the immediate case, the position of The Star is that you have flagrantly violated the provisions of Article 19 of the Collective Agreement and of the Editorial Policy Guide. You have tried to be both actor and critic...

This attempt at direct participation makes it impossible for you to be an impartial and dispassionate reporter on any aspect of the Metro Toronto Police Force. It also violates the conflict of interest provisions of Article 19. You also threatened to disclose material contained in this brief to other competing media such as The Globe and Mail and Now magazine, which is specifically prohibited under the Collective Agreement. You also failed to attend at a meeting with the editor when requested.

I was very much hoping you would reconsider your position and re-evaluate what you were doing. Unfortunately, that has not happened. Consequently, for all the reasons cited above, I am terminating your employment relationship with Toronto Star Newspapers Limited.

22. A grievance, which is currently proceeding to arbitration, was filed challenging the grievor’s dismissal. In addition the present complaint was filed.

23. The parties were agreed that the issue of whether there was just cause for the grievor’s discharge as well as any related questions regarding the interpretation of the collective agreement or the Policy Guide were matters to be dealt with at arbitration. Indeed, the union acknowledged that the employer genuinely believed that the grievor’s conduct warranted discipline. While the

union challenged correctness of that view it did not challenge the good faith of the employer's belief.

24. The union does, however, assert that once the dust settles and the facts are appropriately analyzed, the only real stumbling block to the grievor's continued employment was his insistence on access to the grievance/arbitration procedure. Since access to that procedure is a protected right, it follows that the grievor (quite apart from the merits of the discharge in an arbitration context) was discharged because of his insistence on exercising a right under the *Labour Relations Act*. Once the grievor accepted the employer's conditions, it became unlawful for the employer to insist that he also abandon his right to arbitration. The proximate cause of the grievor's discharge was his insistence on exercising his right to grieve.

25. Not surprisingly, the employer sees the matter differently. In its view the grievor failed to accept the conditions the employer proposed for his continuing employment. The grievor is free to challenge those conditions at arbitration but, as the employer indicated from the outset, non-acceptance of the conditions would result in the implementation of the discharge Mr. Honderich had been inclined to impose from the outset. To accept the union's argument would mean that every time an employer included withdrawal of a grievance as a term of a settlement, it would be committing an unfair labour practice. Even if the Board were to ultimately accept that the only remaining impediment to the grievor's continuing employment was his insistence on filing and pursuing a grievance, this was not the reason for his discharge. The grievor was discharged because of his conduct prior to the employer's proposed resolution of the matter. It would make no labour relations sense to find that an employer who, rather than precipitously opting for discharge, had offered an employee an alternate way of dealing with perceived serious misconduct had thereby violated the Act.

26. Thus, the issue is clearly joined. The ultimate disposition of the complaint must turn on a determination of the reason(s) for the grievor's discharge. If the grievor was discharged for reasons unrelated to his (attempted) exercise of rights under the Act, which the employer acknowledges include the right to access to the grievance- arbitration process, then the complaint must fail. If, however, the grievor's insistence on preserving his right to grieve played a part in the decision to discharge, then the employer's motive may well be tainted by unlawful considerations.

27. We are satisfied that the grievor and the union intended, subject only to the contemplated arbitration hearing, to unconditionally accept the employer's proposed conditions. And notwithstanding Mr. Honderich's meticulous parsing of the differences between his proposed conditions and the grievor's response, neither are we persuaded that Mr. Honderich did not understand this to be the case. In any event, the contours of the grievor's proposal were explained by Mr. Petrie to Mr. Dawson on behalf of the employer. Even assuming Mr. Dawson failed to fully relay the information received, it seems abundantly clear that to the extent Mr. Honderich was genuinely concerned about the scope of the grievor's undertaking or the nature of his acceptance of the Policy Guide these were matters which could easily have been clarified to Mr. Honderich's satisfaction had he bothered to explicitly raise them with the union or the grievor at the time. Consequently, we are driven to the conclusion that the only obstacle to a successful (if only interim) resolution of the discussions between the parties was the grievor's insistence that his ultimate right to file the brief with the Commission and the application of the Policy Guide be determined by arbitration. It does not necessarily follow, however, that the decision to discharge the grievor flowed from his insistence on access to the grievance arbitration procedure.

28. The parties referred us to two cases which, while not directly on point, do serve to define some of the parameters of our current inquiry.

29. In *The Corporation of the City of Ottawa*, [1986] O.L.R.B. Rep. Apr. 533, two employees had grieved their layoffs. The employer offered them alternative positions in accordance with its view of its collective agreement obligations. The union and the employees did not agree that the offer of these particular jobs satisfied the collective agreement obligation. The employer, however, refused to install the employees in these positions unless they thereby withdrew their grievances.

30. In dismissing the complaint the Board offered the following:

21. The facts respecting the sequence of events leave no doubt that the employer forewarned the union and the employees in writing that it was taking the position that an offer of jobs to McDonald and Singh, made pursuant to its collective agreement obligation and accepted by them, would discharge that obligation and resolve the grievances. That position was taken respecting McDonald prior to the making of its offer to him, and respecting Singh, at the same time as making its offer to him. In the face of the employer's position, the grievors eventually relented in the pursuit of their grievances and withdrew them. The choice facing them, as impalatable as it may have been, was to accept the jobs offered or forego those jobs and take their chances that the arbitration process might produce a better result for them. They chose the sure thing. It is not uncommon that either party to the grievance process in a collective agreement has to make that kind of choice. For example, an employee facing lay-off might file a grievance because his employer has denied his claim under a collective agreement to a particular job. While his employer denies that claim, it acknowledges a collective agreement obligation to offer the employee a different job and offers it conditional upon the employee dropping his grievance. The employee's alternatives are clear, either accept the available job and drop the grievance, or take his chances with the grievance procedure.

22. The question of whether the employer's stance in that hypothetical fact situation violates the collective agreement would be an appropriate one for an arbitrator to decide, as it would be in the fact situation here. But it is not for the Board to decide in this case whether the employer has interpreted the collective agreement correctly or incorrectly. Nor is it for the Board to decide whether the sequence of events herein demonstrate a settlement of the grievances. Whether or not the events in this case are characterized as a settlement process, it is clear that the employer has been confronted with grievances arising out of its decision to declare the jobs of McDonald and Singh to be redundant; has offered alternative jobs to them and has made the withdrawal of their grievances a pre-condition of them accepting the jobs. The issue for the Board is whether the employer, in making acceptance of its job offers to McDonald and Singh conditional upon them dropping their grievances, was seeking by threat of dismissal, or other penalty, or other means to compel McDonald and Singh to cease to exercise a right under the Act contrary to section 66(c); or was seeking by intimidation or coercion to compel them to refrain from exercising a right under the Act contrary to section 70.

23. As a matter of theory, any compromise settlement of an employee's grievance made conditional upon withdrawal of the grievance might come within the definition of an unfair labour practice. Such a settlement could be characterized as a successful attempt by the employer, to paraphrase section 66(c) of the Act, to compel a grievor or his union, by threat of pecuniary or other penalty, to waive or cease exercising a right available under the Act; that is, the right to enforcement of the collective agreement through the grievance and arbitration procedure. Nonetheless, a grievor, and in many cases a union without a grievor's consent, may waive that right to full enforcement of a grievor's literal rights under the collective agreement. Indeed, the very purpose of the grievance procedure mandated by the *Labour Relations Act* is to bring about settlement of as many disputes arising out of the collective agreement as possible. It would be counter-productive to that objective if a party responding to a grievance is going to be placed at risk of being found in violation of the Act if it makes withdrawal of the grievance a condition of a settlement offer. There may well be particular circumstances where causing an employee to choose between retaining employment and exercising his right to have the collective agreement enforced could be found a violation of the Act, even where it occurs in the course of settlement attempts, but this is not such a case. Nor on its facts is it a case of the employer acting out of retribution because the employees had filed grievances.

24. The union and the employer have an honest disagreement over the scope of the employer's obligation and the employees' protections under the redundancy provisions of article 9 of their

collective agreement. They have sought unsuccessfully to resolve their differences as they related to McDonald and Singh. In the process, the employer may have played hardball with the union and the employees but, on the evidence before the Board, it was nothing more. While an arbitrator might have found the employer to have violated the collective agreement by its interpretation of article 9 of the agreement and by the way it dealt with McDonald and Singh pursuant to that article, the Board does not find the employer's conduct in evidence here to constitute a violation of section 66 and 70 of the *Labour Relations Act*.

31. A related issue arose in a more recent case, *The Globe and Mail*, [1988] O.L.R.B. Rep. Apr. 384. The employer determined to contract out its trucking operations. Steps were taken to award contracts to four former employees. However, when the union indicated that it would take the position the individuals would continue to be employees subject to the terms of the collective agreement the employer made other arrangements. The union argued that the employer's decision was an attempt to avoid having to negotiate with the union.

32. The Board appeared sympathetic to the claim:

... Parties are undeniably free to negotiate the resolution of their disputes by offering alternative courses of action, including the instigation or withdrawal of a complaint (*The Corporation of the City of Ottawa*, [1986] OLRB Rep. Apr. 533). But where, as here, the prospect of litigation resulted in the Globe's refusal to enter into the arrangement described above with the four drivers because, among other reasons, it might have resulted in the continuation of a bargaining relationship with the union, we are not as sanguine that the Globe was simply attempting to avoid the renewed cost of an employment relationship, a cost it had attempted to avoid through its decision to contract out. In refusing to extend contracts to these drivers, it was also interfering with the possibility that the Guild would continue to be their bargaining agent.

33. Ultimately, however, the Board found it unnecessary to decide whether the employer had violated the Act since it was not satisfied that, in the circumstances of that case, it would be appropriate to grant a remedy even had the Act been violated.

34. Applying similar principles to the facts of the present case, we are of the view that the present complaint must be dismissed.

35. A number of analogies to the present case were offered and discussed by counsel at the hearing. The most obvious analogy, perhaps only because of its simplicity, was not advanced at the hearing. One can easily imagine a situation where in the context of a grievance hearing or a pre-discharge discussion an employer offered to reduce the (actual or contemplated) discharge to a minor suspension. A union or a grievor who felt there were no grounds for discipline might offer to accept and serve the suspension subject to a determination by a Board of Arbitration as to just cause for discipline. It is difficult to imagine, on those bare facts, that an employer who rejected such a proposal and proceeded with or confirmed the discharge would be found to have violated the Act by penalizing the grievor for an insistence on exercising the right to grievance arbitration. Conversely, were an employer to threaten or actually implement discharge in response to a grievor's insistence on advancing a grievance regarding minor discipline to arbitration, liability under the Act might well result.

36. While not a perfect fit, we feel the first of the above scenarios closely parallels the facts of the present case. The decision that the grievor's conduct warranted discharge was taken well before any issue of arbitration was raised. And while the employer's unwillingness to accept the grievor's proposal obviously prevented a resolution of the matter it did not supplant the initial reasons underlying the employer's decision to discharge. In other words, we accept the employer's submission that the real reason for the grievor's discharge was the employer's view of his conduct *prior* to the commencement of the unsuccessful discussion between the parties. In this context, the

soundness of the employer's case for discharge is not a matter for us to determine but rather will be the subject of the arbitration hearing. Had we concluded that the unsuccessful discussions and, in particular, the grievor's insistence (with the support of his union) on submitting the matter to arbitration played any real role in the decision to discharge, the result in the present case would likely have been different. However, given the facts as we find them we are persuaded (to borrow the words of the *City of Ottawa* case, *supra*) that while there may well be particular circumstances where causing an employee to choose between retaining employment and exercising the right to enforce the collective agreement could be a violation of the Act, this is not such a case. Thus, without commenting on the wisdom or efficacy of the employer's rejection of the grievor's proposal, we are not persuaded that this rejection amounted to a violation of the Act.

37. The complaint is hereby dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1991

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3324-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Famalicao Finish Carpentry (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of Famalicao Finish Carpentry in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Famalicao Finish Carpentry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2115-89-R: Ontario Public Service Employees Union (Applicant) v. Canadian Red Cross Society (Toronto Blood Service Centre) (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except Charge Technologists, persons above the rank of Charge Technologist, scientists, blood donor recruitment staff, and employees in bargaining units for which any trade union held bargaining rights as of November 24, 1989" (3 employees in unit)

2990-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Beaverbrook Estates Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in all sectors of the construction industry excluding the industrial, commercial and institutional sector, in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3182-89-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. BMG Canada Ltd. Del-Tech Metal Products Division (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in its Del-Tech Metal Products Division in Delhi, save and except supervisors, persons above the rank of supervisor, office and sales staff" (50 employees in unit) (*Having regard to the agreement of the parties*)

0791-90-R: Canadian Union of Public Employees (Applicant) v. The Belle River Hydro Electric Commission (Respondent)

Unit: "all office, clerical and technical employees of the respondent at Belle River, save and except superintendent and those persons above the rank of superintendent, and persons for whom any trade union held bargaining rights as of June 13, 1990" (3 employees in unit)

1258-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. 746936 Ontario Ltd. c.o.b. as Stone Lodge Retirement Residence (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Guelph, save and except the administrator, persons

above the rank of administrator, registered and graduate nurses, office and clerical staff and food service supervisor” (32 employees in unit) (*Having regard to the agreement of the parties*)

1486-90-R: Canadian Union of Public Employees (Applicant) v. The Boy’s Home (Respondent)

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except assistant supervisors, those above the rank of assistant supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (41 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1509-90-R: United Steelworkers of America (Applicant) v. George F. Pettinos (Canada) Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Hamilton, save and except forepersons, persons above the rank of foreperson, Quality Assurance Co-ordinator, office, clerical and sales staff, and students employed during the school vacation period” (13 employees in unit) (*Having regard to the agreement of the parties*)

1604-90-R: International Union United Plant Guard Workers of America, Local 1962 (Applicant) v. Westin Hotel Company Ltd. c.o.b. as the Westin Harbour Castle (Respondent)

Unit #1 “all security guards of the respondent in the Municipality of Metropolitan Toronto, save and except the assistant director, persons above the rank of assistant director, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (14 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all security guards of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in the Municipality of Metropolitan Toronto, save and except the assistant director, persons above the rank of assistant director” (10 employees in unit) (*Having regard to the agreement of the parties*)

1781-90-R: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. And-Len Construction Co. Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (15 employees in unit)

1961-90-R: United Brotherhood of Carpenters & Joiners of America, Local 1988 (Applicant) v. Construction Insta Inc. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of the respondent in all sectors of the construction industry in the the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

1962-90-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. P. M. E. Contractors Ltd. (Respondent) v. PME Contractors Employees Union (Intervener) v. Group of Employees (Objectors)

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of the respondent in all sectors of the construction industry in within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, and within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (15 employees in unit)

cial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

2149-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. M. Fanone Plumbing Mechanical Contractor Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

2289-90-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. Pro-Mart Industrial Products Ltd. (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Intervener) v. Group of Employees (Objectors)

Unit: “all employees of the respondent at its shop in the City of Sarnia, save and except foremen, persons above the rank of foreman, office and clerical staff, and those for whom any trade union held bargaining rights as of January 16, 1991” (7 employees in unit)

2324-90-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Bill Bailey of Belleville Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2451-90-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Halton Board of Education (Respondent) v. Association of Professional Student Services Personnel (Intervener)

Unit: “all professional student services personnel employed by the respondent in the Regional Municipality of Halton, save and except supervisors, persons above the rank of supervisor, supervising psychologists, and temporary replacements” (70 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2460-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Canwell Electric Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (13 employees in unit)

2480-90-R: Hotels, Clubs, Restaurant & Taverns Employees Union, Local 261 (Applicant) v. Yufar Investments Ltd. (Respondent)

Unit: “all employees of the respondent at 1802 St. Laurent Blvd., Ottawa, Ontario, save and except Assistant Manager, persons above the rank of Assistant Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (22 employees in unit) (*Having regard to the agreement of the parties*)

2484-90-R: Sheet Metal Workers’ International Association, Local 47 (Applicant) v. Capital Air Conditioning (Respondent)

Unit: “all journeymen and apprentice sheet metal workers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of the respondent in all sectors of the construction industry in the the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

2517-90-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Applicant) v. Humpty Dumpty Foods Ltd. (Respondent)

Unit: “all driver-salesmen of the respondent at its locations in Bruce County, Huron County, Lambton County, Perth County and Grey County, save and except supervisors, persons above the rank of supervisor and merchandiser” (8 employees in unit) (*Having regard to the agreement of the parties*)

2523-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Valhalla Inn (Respondent)

Unit: “all front desk employees of the respondent in Thunder Bay, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff, sales staff, co-operative students from an approved educational institution and employees in bargaining units for which any trade union held bargaining rights as of December 21st, 1990” (6 employees in unit) (*Having regard to the agreement of the parties*)

2526-90-R: La Fédération des enseignantes-enseignants des écoles secondaires de l’Ontario (Ontario Secondary School Teachers’ Federation) (Applicant) v. La section catholique du conseil scolaire de langue française d’Ottawa-Carleton, La section publique du conseil scolaire de langue française d’Ottawa-Carleton (Respondent)

Unit #1 - Roman Catholic Sector (la section catholique): “tout le personnel professionnel aux services des élèves employés par l’intimé dans la municipalité régionale d’Ottawa-Carleton à l’exception des postes de surveillants, et des postes supérieurs à ceux de surveillants, les employé(e)s dans les unités de négociations pour lesquels un autre syndicat détient les droits de représentation en date du vingt-et-un décembre 1990” (30 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2 - Public Sector (la section publique): “tout le personnel professionnel aux services des élèves employés par l’intimé dans la municipalité régionale d’Ottawa-Carleton à l’exception des postes de surveillants, et des postes supérieurs à ceux de surveillants, et les employé(e)s dans les unités de négociations pour lesquels un autre syndicat détient les droits de représentation en date du vingt-et-un décembre 1990” (20 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2542-90-R: Teamsters Local Union 419 (Applicant) v. Bridgestone/Firestone Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and students employed during the school vacation period” (30 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2547-90-R: Service Employees' International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Istituto Nazionale Per IL Commercio Estero (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and the administrative secretary to the commissioner" (8 employees in unit) (*Having regard to the agreement of the parties*)

2569-90-R: Public Service Alliance of Canada (Applicant) v. Unitarian Service Committee of Canada (USC Canada) (Respondent)

Unit: "all employees of the respondent in the Regional Municipalities of Ottawa-Carleton and Kitchener-Waterloo, save and except supervisors, persons above the rank of supervisor, and students employed during the school vacation period" (18 employees in unit) (*Having regard to the agreement of the parties*)

2607-90-R: Ontario Public School Teachers' Federation (Applicant) v. The East Parry Sound Board of Education (Respondent)

Unit: "all educational assistants employed by the respondent in the District of Parry Sound, save and except Manager - Human Resources, persons above the rank of Manager - Human Resources and persons for whom any trade union held bargaining rights as of January 8, 1991" (26 employees in unit) (*Having regard to the agreement of the parties*)

2621-90-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. 510521 Ontario Ltd. c.o.b. James Electric (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of the respondent in all sectors of the construction industry in within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2638-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. Marchant Property Management Ltd. (Respondent)

Unit: "all employees of the respondent engaged in cleaning and maintenance of 7 Capri Road in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property and maintenance managers, persons above the rank of property and maintenance managers, office and clerical staff, persons regularly employed for not more than 19 hours per week and students employed during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*)

2639-90-R: Canadian Union of Public Employees (Applicant) v. Corporation of the County of Lambton (Respondent)

Unit: "all employees of the respondent at Coronation Park Day Nursery in Sarnia-Clearwater, save and except supervisors, persons above the rank of supervisor, and persons for whom any trade union held bargaining rights as of January 9, 1991" (24 employees in unit) (*Having regard to the agreement of the parties*)

2646-90-R: Amalgamated Clothing & Textile Workers Union AFL:CIO:CLC: (Applicant) v. Paramount Bedding & Upholstery Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

2647-90-R: Ontario Public School Teachers' Federation (Applicant) v. The Nipissing Board of Education (Respondent)

Unit: "all professional support personnel employed by the respondent in the District of Nipissing, save and

except administrative supervisors, persons above the rank of administrative supervisor, confidential secretary to the Director of Education, confidential secretary to the Superintendent of Human Resources, confidential secretary to the Superintendent of Business Affairs, confidential secretary to the Superintendent of Programs, confidential secretary to the Superintendent of Planning and Development and persons for whom any trade union held bargaining rights as of January 11, 1991” (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2649-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Valbay Hotel Ltd. c.o.b. Valhalla Inn (Respondent)

Unit: “all employees of the Valhalla Inn, 1 Valhalla Inn Road, Thunder Bay, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office and sales staff, front desk staff and banquet staff” (30 employees in unit) (*Having regard to the agreement of the parties*)

2656-90-R: Service Employees Union, Local 183 (Applicant) v. Dussek Campbell Ltd. (Respondent)

Unit: “all employees of the respondent at 299 Statton Street, Belleville, save and except foremen, persons above the rank of foreman, office and sales persons, quality control and laboratory personnel, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (16 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2683-90-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Standard Equipment Supply Ltd. (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers’ apprentices in the employ of the respondent in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

2688-90-R: Canadian Union of Public Employees (Applicant) v. Young Women’s Christian Association of Peterborough, Victoria & Haliburton (Respondent)

Unit #1: “all employees of the respondent in the Counties of Peterborough, Victoria and Haliburton, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (47 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: “all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in the Counties of Peterborough, Victoria and Haliburton, save and except supervisors, persons above the rank of supervisor” (22 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2752-90-R: Canadian Union of Public Employees (Applicant) v. Reliacare Inc. c.o.b. Essex Health Care Centre (Respondent)

Unit: “all employees of the respondent at its Rest Home Division in the Town of Essex, save and except supervisors, persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

2762-90-R: London & District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. St. Peter’s Seminary Corporation of London in Ontario Ltd. (Respondent)

Unit #1: “all lay employees of the respondent in London, save and except supervisors, persons above the rank of supervisor, teaching faculty, office, clerical and library staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all lay employees of the respondent in London regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, teaching faculty, office and library staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

2790-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Carbon Steel Profiles Ltd. (Respondent)

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, technical and sales staff, and quality control technician” (53 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2831-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Glen Arrow Products Limited (Respondent)

Unit: “all employees of the respondent at Woodstock, save and except forepersons, persons above the rank of foreperson, office and sales staff” (25 employees in unit) (*Having regard to the agreement of the parties*)

2845-90-R: Canadian Union of Public Employees (Applicant) v. Kirkland Lake & District Association for the Mentally Retarded (Respondent)

Unit: “all employees of the respondent in Kirkland Lake regularly employed for not more than 24 hours per week, and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office staff” (33 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1619-87-R: International Woodworkers of America (Applicant) v. Contractors Cleanup Services Ltd. (Respondent) v. Labourers’ International Union of North America, Local 607 (Intervener)

Unit: “all employees of Contractors Cleanup Services Ltd. employed as truck and transport drivers in the Province of Ontario, save and except foremen, persons above the rank of foreman” (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	20
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

1620-87-R: International Woodworkers of America (Applicant) v. Kopka Transport Inc. (Respondent)

Unit: “all employees of Kopka Transport Inc. employed as truck and transport drivers in the Province of Ontario, save and except foremen, persons above the rank of foreman” (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	10
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	1

Applications for Certification Dismissed Without Vote

0784-90-R; 0785-90-R: United Brotherhood of Carpenters & Joiners of America, Locals 785 & 2451 (Applicant) v. Melloul-Blamey Construction Ltd. (Respondent) v. Labourers’ International Union of North America, Local 1081 (Intervener) v. Group of Employees (Objectors) (2 employees in unit)

2011-90-R: Service Employees’ International Union, Local 204 Staff Association (Applicant) v. Service Employees’ International Union and Service Employees’ International Union, Local 204 (Respondent) v. United Steelworkers of America (Intervener) (15 employees in unit)

2275-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Al White Construction Co. Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) (5 employees in unit)

2561-90-R; 2562-90-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Sheraton Parkway Hotel (Respondent) v. Group of Employees (Objectors) (72 employees in unit)

2592-90-R; 2593-90-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. M.D.S. Health Group Ltd. (Respondent) (4 employees in unit)

2638-89-R: Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 141 (Applicant) v. Beaver Lumber Co. Ltd. and Bruce W. Smitn Building Materials Ltd. (Respondent) v. Group of Employees (Objectors) (5 employees in unit)

2735-90-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Be Bop Inc. c.o.b. Studebakers (Respondent) (31 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1617-87-R: International Woodworkers of America (Applicant) v. Paul Gagnon Trucking (Respondent)

Unit: "all employees of Paul Gagnon Trucking employed as truck and transport drivers in the Province of Ontario, save and except foremen, persons above the rank of foreman" (3 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	2

2242-88-R: International Union of Operating Engineers, Local 793 (Applicant) v. Graham Bros. Construction Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (37 employees in unit)

Number of names of persons on list as originally prepared by employer	37
Number of persons who cast ballots	34
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	30

2527-90-R: Laundry & Linen Drivers & Industrial Workers Union, Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 656508 Ontario Ltd. c.o.b. as The Skylon Tower (Respondent)

Unit: "all employees of the respondent in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, office and clerical staff, entertaining persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (77 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	77
Number of persons who cast ballots	73

Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	70
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	40
Ballots segregated and not counted	3

2529-90-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Unitarian House of Ottawa/Maison Unitarienne d'Ottawa (Respondent)

Unit: "all employees of the respondent in the City of Ottawa, save and except registered and graduate nurses, supervisors and persons above the rank of supervisor" (28 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer	28
Number of persons who cast ballots	24
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	15

Applications for Certification Withdrawn

1613-87-R: International Woodworkers of America (Applicant) v. Menroy Trucking Inc. (Respondent)

1616-87-R: International Woodworkers of America (Applicant) v. Gosselin Trucking (Respondent)

1618-87-R: International Woodworkers of America (Applicant) v. J. Bernard Trucking (Respondent)

2039-90-R: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Falla Construction Ltd. (Respondent)

2396-90-R: Graphic Communications International Union, Local 500M (Applicant) v. Company owned and operated by Vern Wuebbolt and Ron Evans (Respondent)

2533-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Beaver Lumber Company Ltd. (Respondent)

2576-90-R: United Steelworkers of America (Applicant) v. Acme Sign (Ontario) Inc. (Respondent)

2580-90-R: Peterborough Typographical Union, Local 248 (Applicant) v. Northumberland Publishers Ltd. (Warkworth Journal) (Respondent)

2611-90-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. K. W. Glass Services Inc. (Respondent)

2641-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. Marchant Property Management (A Division of Marchant & Company Ltd.) (Respondent)

2761-90-R: Ontario Pipe Trades Council of the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada (Applicant) v. Oren Mechanical Inc. (Respondent)

2763-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Rowad Pipeline Co. Ltd. (Respondent)

2805-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Carbon Steel Profiles Co. Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1872-90-FA: Teamsters, Local Union 419 (Applicant) v. Arrow Games Inc. (Respondent) (*Granted*)

2707-90-FC: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Bonik Inc. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0003-90-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Agincourt Electric and/or Agincourt Electrical Contracting Company and/or KNK Ltd. (Respondents) (*Granted*)

2010-90-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 643210 Ontario Inc. operated by M. Concrete Forming and M. Concrete Forming Ltd. (Respondents) (*Granted*)

2404-90-R: The Operative Plasterers' & Cement Masons' International Association of the United States and Canada, Local 172, Restoration Steeplejacks (Applicant) v. Hogan Restorations Ltd. and Sahara Water Proofing Systems Ltd. (Respondents) (*Withdrawn*)

2479-90-R: International Union of Allied, Novelty & Production Workers, Local 905 (Applicant) v. Canadian Atlas Furniture Inc. and Canadian Atlas Furniture (1990) Inc. (Respondents) (*Withdrawn*)

2564-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Valerio Construction Inc., Valerio Brothers Carpentry (Respondents) (*Granted*)

2663-90-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Paul Smyth Flooring Ltd. and 383572 Ontario Ltd. c.o.b. as 'The Peppercorn Company' (Respondents) (*Granted*)

2757-90-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Pizza Pizza Ltd. and Franchise Owners Toronto Ltd. (Respondents) (*Granted*)

SALE OF A BUSINESS

1423-90-R: The Toronto Hospital (Applicant) v. The Ontario Nurses' Association (Respondents) (*Withdrawn*)

2010-90-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 643210 Ontario Inc. operated by M. Concrete Forming and M. Concrete Forming Ltd. (Respondents) (*Granted*)

2379-90-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the County of Simcoe (Respondent) v. Brewery, Malt & Soft Drink Workers, Local 304 (Intervener) (*Withdrawn*)

2405-90-R: The Operative Plasterers' & Cement Masons' International Association of the United States and Canada, Local 172, Restoration Steeplejacks (Applicant) v. Hogan Restorations Ltd. and Sahara Water Proofing Systems Ltd. (Respondents) (*Withdrawn*)

2479-90-R: International Union of Allied, Novelty & Production Workers, Local 905 (Applicant) v. Canadian Atlas Furniture Inc. and Canadian Atlas Furniture (1990) Inc. (Respondents) (*Withdrawn*)

2563-90-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Valerio Construction Inc., Valerio Brothers Carpentry (Respondents) (*Granted*)

2602-90-R: United Steelworkers of America (Applicant) v. Mansour Mining Supply Inc. (Respondent) v. Sudbury Mine, Mill & Smelter Workers Union, Local 598 (Intervener #1) v. Fontaine & Associates (Intervener #2) (*Withdrawn*)

2663-90-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Paul Smyth Flooring Ltd. and 383572 Ontario Ltd. c.o.b. as 'The Peppercorn Company' (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0248-90-R: Calogero Mattina (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council on behalf of its affiliated Local Unions 183, 247, 491, 493, 506, 597, 607, 625, 837, 1036, 1059, 1081, and 1089 (Respondents) v. Inzola Construction (1976) Ltd. (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

2290-90-R: Rosa Bada, Isaura Custodio, Concetta Fata, Maria Jose Feijo, Rose Kulainis, Gin Shou Hsueh, Kevin Lau, Tsun Keung Tam, So-hin Lee (Applicants) v. Ontario District Council of the International Ladies' Garment Workers' Union, Locals 14, 83 & 92 (Respondent) v. Lady Manhattan of Canada (Intervener) (9 employees in unit) (*Granted*)

2513-90-R: Donald Akey (Applicant) v. Labourers' International Union of North America, Local 247 (Respondent) v. Fairfield Management Ltd. (Intervener) (3 employees in unit) (*Granted*)

2630-90-R: James W. McLary (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO, CLC (Respondent) v. Work Wear Corporation of Canada Ltd. (Intervener) (3 employees in unit) (*Granted*)

2645-90-R: Melvin Cadwell (Local 252) (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (C.A.W.) (Respondent) (50 employees in unit) (*Granted*)

2698-90-R: Ronald Watson (Applicant) v. United Steelworkers of America (Respondent) (7 employees in unit) (*Granted*)

2828-90-R: Steve Cochrane (Applicant) v. Retail, Wholesale & Department Store Union, Local 414 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

2514-90-U: Electrical Contractors Association of Ontario (Applicant) v. International Brotherhood of Electrical Workers Construction Council of Ontario, Motor City Electric (Canada) Ltd. and IBEW, Local 773 (Respondents) (*Granted*)

2984-90-U: Carpenters' Employer Bargaining Agency, Toronto Construction Association/General Contractors Section on behalf of Dineen Construction Limited, Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario on behalf of Aries Electrical Services Limited, Ainsworth Electric Co. Ltd., and Kennedy Electric Limited (Applicant) v. The International Brotherhood of Electrical Workers, Local 353, Joe Fashion/Business Representative/Local 353, Labourers' International Union of North America

Local 506, Nick Barbieri/Business Representative/Labourers' Local 506, United Brotherhood of Carpenters and Joiners of America Local 27, Frank Rimes/Business Representative/Carpenters' Local 27 (Respondents) (*Granted*)

2985-90-U: Mechanical Contractors Association Ontario and Mechanical Contractors Association Toronto (Applicant) v. United Association of Journey men and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 and Vince McNeil (Respondents) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2018-87-U: Ottawa Newspaper Guild (Complainant) v. The Ottawa Citizen, A Division of Southam Inc. (Respondent) (*Granted*)

0502-89-U: William Spencer Green (Complainant) v. CAW, Local 195 & Fabricated Steel (Respondents) (*Dismissed*)

0377-90-U: International Association of Machinists & Aerospace Workers, District Lodge 717 (Complainant) v. Peacock Inc. (Respondent) (*Withdrawn*)

0464-90-U: The Carleton Roman Catholic School Board Employee's Association and Gerry Poirier (Complainants) v. The Carleton Roman Catholic School Board (Respondent) (*Withdrawn*)

0465-90-U: The Carleton Roman Catholic School Board Employee's Association and Gerry Poirier (Complainants) v. La Section catholique du Conseil scolaire de langue française d'Ottawa-Carleton, and Le Conseil plénier du Conseil scolaire de langue française d'Ottawa-Carleton (Respondents) (*Dismissed*)

0590-90-U: United Steelworkers of America (Complainant) v. Drillex International of Canada Inc. (Respondent) (*Granted*)

0867-90-U: Diane R. Floyd (Complainant) v. Hotel, Clubs, Restaurants, Tavern, Employees Union, Local 261 (Respondent) (*Dismissed*)

1024-90-U: Ernest John Taylor (Complainant) v. Boilermakers, Local 128 (Respondent) (*Withdrawn*)

1042-90-U: Ernest John Taylor (Complainant) v. Hydra Dyne Industrial Clean Services (Respondent) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Intervener) (*Withdrawn*)

1270-90-U: Harbhajan Sohi (Complainant) v. Sealy Furniture Ltd. (Respondent) v. Laundry & Linen Drivers and Industrial Workers Union, Teamsters Local No. 847, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener) (*Dismissed*)

1329-90-U: United Food & Commercial Workers International Union, AFL-CIO-CLC (Complainant) v. Loeb IGA (William Street) Chatham, Ontario (Respondent) (*Withdrawn*)

1472-90-U: Ronel G. Castro (Complainant) v. Teamsters, Local Union No. 419 (Frank Grimaldi), Consumers Distributing (Terry R. Olmstead) (Respondent) (*Dismissed*)

1503-90-U: Reliacare Inc., c.o.b. as Maitland Manor Health Care Centre (Complainant) v. Service Employees' Union, Local 210 (Respondent) (*Withdrawn*)

1902-90-U; 1903-90-U: Ontario Nurses' Association (Complainant) v. Toronto General Hospital (Respondent) (*Withdrawn*)

1935-90-U: Mr. Robert David (Complainant) v. United Food & Commercial Workers International Union, Local 114P and Mr. Gunther Hoewing, Chief Steward (Respondents) (*Withdrawn*)

1974-90-U: International Brotherhood of Electrical Workers, Local 105 (Complainant) v. Milan Electric Ltd. (Respondent) (*Withdrawn*)

2000-90-U: The Canadian Textile & Chemical Union (Complainant) v. The Children's Book Store (Respondent) (*Withdrawn*)

2001-90-U: Ontario Public Service Employees Union (Complainant) v. Fortune Society of Canada (Stanford) (Respondent) (*Withdrawn*)

2040-90-U: Reinhard Ehlert (Complainant) v. Teamsters Union, Local 879 (Respondent) (*Withdrawn*)

2076-90-U: Southern Ontario Newspaper Guild, Local 87 (Complainant) v. The Cambridge Reporter, a Division of Canadian Newspapers Company Ltd. (Respondent) (*Withdrawn*)

2141-90-U: Graphic Communications International Union, Local 500M (Complainant) v. Economy Web Printing Inc. (Respondent) (*Withdrawn*)

2235-90-U: United Garment Workers of America (Complainant) v. Cumberland Clothing Ltd. (Respondent) (*Withdrawn*)

2243-90-U: Branimir Katkic (Complainant) v. CAW, Local 1285 and Terry Gorman President of CAW Local 1285 (Respondent) (*Dismissed*)

2257-90-U: Ontario Nurses' Association (Complainant) v. Windsor Coalition for Development Health Care Associates (Respondent) (*Withdrawn*)

2265-90-U: Teamsters Local Union No. 419 (Complainant) v. Square D Canada (Respondent) (*Withdrawn*)

2266-90-U: Hotel, Motel & Restaurant Employees Union, Local 442 (Complainant) v. Golden Griddle Pancake House (Respondent) (*Withdrawn*)

2280-90-U: Frank Crisostimo (Complainant) v. Toronto Transit Commission & Amalgamated Transit, Local 113 (Respondents) (*Withdrawn*)

2431-90-U; 2473-90-U: Ontario District Council, Locals - 14, 83 & 92 of the International Ladies Garment Workers' Union (Complainant) v. Lady Manhattan of Canada (Respondent) (*Withdrawn*)

2433-90-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Sarnia Loeb - IGA & Loeb Inc. (Respondents) (*Withdrawn*)

2457-90-U: Charles Benoist (Complainant) v. Graphic Communications International Union, Local 466 and Sellotape Canada Inc. (Respondents) (*Withdrawn*)

2461-90-U; 2463-90-U; 2646-90-U: Service Employees Union, Local 183 (Complainant) v. Gibson Holdings (Ontario) Ltd. and Tim Gibson & Larry Gibson (Respondents) (*Withdrawn*)

2515-90-U: Electrical Contractors Association of Ontario (Complainant) v. International Brotherhood of Electrical Workers, Construction Council of Ontario, Motor City Electric (Canada) Ltd. and IBEW, Local 773 (Respondents) (*Withdrawn*)

2530-90-U: Hay Stationery Inc. (Complainant) v. Teamsters Union, Local No. 141 (Respondent) (*Withdrawn*)

2537-90-U: Graphic Communications International Union, Local 500M (Complainant) v. S.P. Graphics and Michael A. Poole (Respondents) (*Withdrawn*)

2539-90-U: Tony Rooyackers (Complainant) v. Amalgamated Clothing & Textile Workers, Local 1305 (Respondent) v. Fiberglas Canada Inc. (Intervener) (*Withdrawn*)

2546-90-U: Carlo Scarcello (Complainant) v. International Brotherhood of Painters & Allied Trades (Respondent) (*Dismissed*)

2551-90-U: Niagara Health Care & Service Workers Union, Local 302, affiliated with Christian Labour Association of Canada (Complainant) v. West Lincoln Memorial Hospital (Respondent) (*Withdrawn*)

2570-90-U: Marie Leader; Employee of Hay Stationery (Complainant) v. Melonie Lauzon; Union Steward at Hay Stationery for the Teamsters', Local 141 (Respondent) (*Withdrawn*)

2599-90-U: Canadian Union of Public Employees (Complainant) v. Township of King (Respondent) (*Withdrawn*)

2615-90-U: Dennis Abernot (Complainant) v. United Steelworkers of America, L.U. 2251 (Respondent) (*Dismissed*)

2616-90-U: Mordecai Falconer (Complainant) v. Local Union 183 (Respondent) (*Withdrawn*)

2622-90-U: Ontario Public School Teachers' Federation (Complainant) v. Peterborough County Board of Education (Respondent) (*Withdrawn*)

2655-90-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Warner Pro Hardware (Respondent) (*Withdrawn*)

2670-90-U: Eupert Tyrell (Complainant) v. Kaiser Aluminum Company (Respondent) (*Withdrawn*)

2675-90-U; **2676-90-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Integram (Respondent) (*Withdrawn*)

2689-90-U: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ideal Railings Ltd. (Respondent) (*Withdrawn*)

2716-90-U: International Brotherhood of Painters & Allied Trades, Local 1824 (Complainant) v. K.W. Glass Systems Inc. (Respondent) (*Withdrawn*)

2750-90-U: Douglas Gavin (Complainant) v. Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 230 (Respondent) (*Dismissed*)

2766-90-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1987 (Complainant) v. Pebra Inc. (Respondent) (*Withdrawn*)

2767-90-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (Complainant) v. Pebra Inc. (Respondent) (*Dismissed*)

2779-90-U: International Brotherhood of Electrical Workers, Local 353 (Complainant) v. Canwell Electric Ltd. (Respondent) (*Withdrawn*)

2800-90-U: Vrahonis Proikakis (Complainant) v. Sheet Metal Workers' International Association, Local 30 Production Section (Respondent) (*Withdrawn*)

2816-90-U: Amalgamated Clothing & Textile Workers Union AFL-CIO-CLC (Complainant) v. Paramount Bedding & Upholstery Company (Respondent) (*Withdrawn*)

2817-90-U: Mr. Joao (John) DeMelo (Complainant) v. Secretary Treasurer Mr. Manuel Reis Labourers International Union (Respondent) (*Withdrawn*)

2829-90-U: The Children's Book Store (Complainant) v. The Canadian Textile & Chemical Union (Respondent) (*Withdrawn*)

2854-90-U: E. Price Morris (Complainant) v. Paperboard Industries (Respondent) (*Dismissed*)

2880-90-U: Reginald R. Charlton (Complainant) v. Laidlaw Waste Systems Labourers International Union (Respondent) (*Dismissed*)

2967-90-U: Kevin D. Bromell (Complainant) v. Goodyear Canada Inc. (Respondent) (*Dismissed*)

3011-90-U: Michael Fennell (Complainant) v. Carol Anne Hornett (Respondent) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

2328-90-M: Mary Olcsvary (Applicant) v. C.A.W. (Respondent Trade Union) v. Johnson Controls Ltd. (Respondent Employer) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2620-90-M: Cowall Manufacturing Inc. (Employer) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

3472-84-JD: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Complainant) v. Labourers' International Union of North America, Local 597 and Steen Contractors Ltd. (Respondents) v. Milne & Nicholls/Vanbots Joint Venture (Intervener) (*Granted*)

1465-88-JD: Labourers' International Union of North America, Local 183 (Complainant) v. Dufferin Construction Company, a Division of St. Lawrence Cement Inc. and United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondents) (*Dismissed*)

3227-88-JD: United Brotherhood of Carpenters & Joiners of America, Local 2222 (Complainant) v. Electrical Power Systems Construction Association, Ontario Hydro, Ontario Sheet Metal Workers' Conference on its own behalf and on behalf of Local 473 (Respondents) (*Granted*)

2350-89-JD: Millwright District Council of Ontario on its own behalf and on behalf of Local 1151 (Complainant) v. International Brotherhood of Electrical Workers, Local 402 and E.S. Fox Ltd. (Respondents) (*Dismissed*)

1666-90-JD: International Association of Heat & Frost Insulators & Asbestors Workers (Complainant) v. International Brotherhood of Painters & Allied Trades, Local 1891, Electrical Power System Construction Association, Ontario Hydro, CASC/Joint Venture (Respondents) (*Withdrawn*)

2380-90-JD: Boise Cascade Canada Ltd. (Complainant) v. Canadian Paperworkers Union, Local 92 and International Association of Machinists, Local 771 (Respondents) (*Withdrawn*)

2595-90-JD: Labourers' International Union of North America, Local 506 (Complainant) v. Acme Building & Construction Ltd. and Pacer Panel Systems Inc. and United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondents) (*Dismissed*)

2596-90-JD: Labourers' International Union of North America, Local 506 (Complainant) v. Division Construction Ltd. and Pacer Panel Systems Inc. and United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondents) (*Dismissed*)

2597-90-JD: Labourers' International Union of North America, Local 506 (Complainant) v. Vanbots Con-

struction Corporation and Pacer Panel Systems Inc. and United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2006-90-M: Canadian Union of Public Employees, Local 3116 (Applicant) v. The Halton Roman Catholic School Board (Respondent) (*Granted*)

2953-90-M: United Steelworkers of America (Applicant) v. Township of Osgoode Care Centre (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0514-90-OH: Robert Campbell (Complainant) v. ABB Combustion Engineering Systems Combustion Engineering Canada Inc. (Respondent) (*Granted*)

1434-90-OH: Ron Mrochek (Complainant) v. Arni M. Pechkoff (Respondent) (*Withdrawn*)

2229-90-OH: Jacqueline Kynaston (Complainant) v. North American Coating Laboratories (Respondent) (*Withdrawn*)

2618-90-OH: Andreas Andoniou (Complainant) v. All-Metal Machine Specialties Ltd. (Respondent) (*Withdrawn*)

2624-90-OH: Lise L. Courchesne (Complainant) v. Dr. D. B. Davidson (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1067-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Dufferin Construction Company (Respondent) (*Dismissed*)

1068-88-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. The Foundation Company of Canada Ltd. (Respondent) (*Dismissed*)

2859-88-G: The Ontario Allied Construction Trades Council on behalf of United Brotherhood of Carpenters & Joiners of America, Local 2222 (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

1164-89-G: International Brotherhood of Electrical Workers, Local 402 (Applicant) v. E.S. Fox Ltd. (Respondent) v. Millwrights District Council on its own behalf and on behalf of its Local 1151 (Intervener) (*Dismissed*)

1762-89-G; 1763-89-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Orion Forming Ltd. (Respondent) (*Withdrawn*)

2273-89-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Ellis-Don Forming Ltd. (Respondent) (*Withdrawn*)

2786-89-G: International Brotherhood of Painters & Allied Trades, District Council 46 (Applicant) v. Lesniewski Painting Ltd. (Respondent) (*Withdrawn*)

2865-89-G: The Ontario Allied Construction Trades Council (Applicant) v. The Electrical Power Systems Construction Association (Respondent) (*Dismissed*)

3012-89-G: International Union of Operating Engineers, Local 793 (Applicant) v. Pumpcrete Rental Corporation (Respondent) (*Withdrawn*)

0015-90-G: Labourers' International Union of North America, Local 527 (Applicant) v. TMG Rock Contractors Ltd. (Respondent) (*Withdrawn*)

0148-90-G; 0649-90-G; 0650-90-G: The Ontario Allied Construction Trades Council (Applicant) v. The Electrical Power Systems Construction Association (Respondent) (*Withdrawn*)

0251-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Genspec Construction Inc. (Respondent) (*Withdrawn*)

0349-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Andreynolds Company Ltd. (Respondent) (*Withdrawn*)

0461-90-G: Ontario Allied Construction Trades Council; International Union of Operating Engineers, International Union of Operating Engineers, Local 793 (Applicants) v. Electrical Power Systems Construction Association, Ontario Hydro (Respondents) (*Granted*)

0745-90-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Combustion Engineering Canada Inc. (Respondent) (*Withdrawn*)

1105-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Dennison Carpentry (Respondent) (*Granted*)

1561-90-G: Christian Labour Association of Canada (Applicant) v. Indeltec Ltd. (Respondent) (*Granted*)

1572-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. New Generation Drywall Ltd. (Respondent) (*Withdrawn*)

1630-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. Venshore Mechanical Ltd. (Respondent) (*Withdrawn*)

1634-90-G: Labourers' International Union of North America, Local 1059 (Applicant) v. M. Concrete Forming (Respondent) (*Granted*)

1870-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 Refrigeration Workers of Ontario (Applicant) v. Industrial Systems Division of Sydenham Sales & Services Ltd. (Respondent) (*Withdrawn*)

1949-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Dawn Enterprises Ltd. (Respondent) (*Granted*)

2111-90-G: Construction Workers, Local 53, CLAC (Applicant) v. Pro-Ject Mechanical Ltd. and 8801616 Ontario Inc. c.o.b. as Wes-Co (London) Mechanical (Respondents) (*Withdrawn*)

2137-90-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Wonnacott Excavating Ltd. (Respondent) (*Withdrawn*)

2209-90-G; 2773-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Servello Carpentry Ltd. (Respondent) (*Granted*)

2211-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Calvano Lumber & Trim Co. Ltd. (Respondent) (*Granted*)

2337-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, on its own behalf and on behalf of its Local 46 (Applicant) v. Electrical Power Systems Construction Association & Kingston Contracting Ltd. (Respondents) v. United Brotherhood of Carpenters & Joiners of America (Intervener) (*Withdrawn*)

- 2343-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Cooling Tower Maintenance & Repair Ltd. and Cooling Tower Maintenance Inc. (Respondents) (*Granted*)
- 2344-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Cooling Tower Maintenance & Repair Ltd. and Cooling Tower Maintenance Inc. (Respondents) (*Withdrawn*)
- 2347-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Doon Valley Craftsmen Inc. (Respondent) (*Granted*)
- 2422-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. R.J. Nicol Construction (1975) Ltd. (Respondent) (*Withdrawn*)
- 2454-90-G; 2664-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Paul Smyth Flooring Ltd. and 383572 Ontario Ltd. o/a 'The Peppercorn Company' (Respondents) (*Granted*)
- 2455-90-G:** Sheet Metal Workers' International Association, Local 285 (Applicant) v. Bratti Mechanical Inc. (Respondent) (*Granted*)
- 2468-90-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Dalacoustic Contractors Inc. (Respondent) (*Withdrawn*)
- 2472-90-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Fontaine Construction Reg. (Respondent) (*Withdrawn*)
- 2508-90-G:** International Union of Operating Engineers, Local 793 (Applicant) v. 582242 Ontario Ltd. c.o.b. Sierra Landscaping (Respondent) (*Granted*)
- 2509-90-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Globe Excavating & Grading Ltd. (Respondent) (*Granted*)
- 2510-90-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Ambro Materials & Construction Ltd. (Respondent) (*Withdrawn*)
- 2521-90-G:** International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. Zimmcor Co. Ltd. (Respondent) (*Granted*)
- 2559-90-G:** Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1590 (Applicant) v. City Accoustics Ltd. (Respondent) (*Granted*)
- 2605-90-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. The Bratti Group and Bratti Mechanical Inc. (Respondents) (*Granted*)
- 2633-90-G:** International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Z.J. Painting & Decorating Four Brothers Painting Inc. (Respondents) (*Granted*)
- 2634-90-G:** International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Montego Painting & Decorating Inc. (Respondent) (*Withdrawn*)
- 2635-90-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Global Foundations Inc. Concrete (Respondent) (*Withdrawn*)
- 2636-90-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Colosimo Contracting Ltd. (Respondent) (*Granted*)
- 2644-90-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Power Pac Construction Co. Ltd. (Respondent) (*Granted*)

2653-90-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. R.J. Nichol Construction (1975) Ltd. (Respondent) (*Withdrawn*)

2678-90-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. F T C Leggieri Flooring Ltd. (Respondent) (*Withdrawn*)

2679-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Doef's Ironworks Ltd. (Respondent) (*Withdrawn*)

2680-90-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Remaz Contracting Corp. (Respondent) (*Granted*)

2696-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Crete-Con Construction Ltd. (Respondent) (*Granted*)

2699-90-G: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Enereau Investments Inc. (Respondent) (*Granted*)

2705-90-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Aries Electric (Respondent) (*Withdrawn*)

2709-90-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Hickey Canada Inc. (Respondent) (*Withdrawn*)

2710-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Lackie Industrial Contractors Ltd. (Respondent) (*Dismissed*)

2711-90-G: The Ontario Allied Construction Trades Council on behalf of Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. The Electrical Power Systems Construction Association and Umacs of Canada Inc. (Respondent) (*Withdrawn*)

2723-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Vankirk Contracting (Respondent) (*Granted*)

2724-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Tech-Loc Contracting (Respondent) (*Withdrawn*)

2727-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Dominion Paving Ltd. (Respondent) (*Granted*)

2728-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Spring Drywall Car. Ltd. (Respondent) (*Granted*)

2746-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. 709631 Ontario Inc. (Respondent) (*Granted*)

2748-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. D.I. Construction Co. Inc. (Respondent) (*Granted*)

2758-90-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Triple A Electric Ltd. (Respondent) (*Withdrawn*)

2772-90-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. 854858 Ontario Inc. (Respondent) (*Withdrawn*)

2777-90-G: Labourers' International Union of North America, Local 506 (Applicant) v. Globe Brick Ltd./789977 Ontario Ltd. (Respondent) (*Withdrawn*)

2782-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. 515112 Ontario Ltd. o/a Bluebird Construction & Lakeway Rentals Inc. (Respondents) (*Withdrawn*)

2789-90-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Continental Terrazzo & Marble Co. (Respondent) (*Granted*)

2795-90-G: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Salwood General Contractors Inc. (Respondent) (*Granted*)

2799-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Form Tech Construction (567557 Ont. Ltd.) (Respondent) (*Granted*)

2804-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. The Countryside Farms Ltd. (Respondent) (*Granted*)

2807-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Strata Landscaping Ltd. (Respondent) (*Withdrawn*)

2850-90-G: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. Hitech Erectors Inc. (Respondent) (*Granted*)

2851-90-G: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. Y.G.S. Inc. (Respondent) (*Withdrawn*)

2852-90-G: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. St. Catharines Glass & Mirror Ltd. (Respondent) (*Granted*)

2863-90-G: Labourers' International Union of North America, Local 183 (Applicant) v. Conpour Services Ltd. (Respondent) (*Granted*)

2875-90-G: International Union of Operating Engineers, Local 793 (Applicant) v. Faro Trucking & Contracting Ltd. (Respondent) (*Granted*)

2882-90-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Nelmar Drywall Company Ltd. (Respondent) (*Withdrawn*)

2906-90-G: Labourers' International Union of North America, Local 607 (Applicant) v. Pe Ben Industries Company Ltd. (Respondent) (*Withdrawn*)

2912-90-G: Labourers' International Union of North America, Local 506 (Applicant) v. John Wheelwright Ltd. (Respondent) (*Withdrawn*)

2927-90-G: International Brotherhood of Painters & Allied Trades, Local 200 Ottawa (Applicant) v. Killarney Glass & Aluminum Ltd. (Respondent) (*Withdrawn*)

2931-90-G; 2932-90-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Masterheat Mechanical Inc., Air Thermal Systems Division (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2999-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Famalicao Finish Carpentry (Respondent) (*Withdrawn*)

0089-88-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Famalicao Finish Carpentry and Labourers' International Union of North America, Local 183 (Respondents) (*Withdrawn*)

1614-90-U: Service Employees' Union, Local 210 (Complainant) v. Heritage Living Centres Ontario Inc. o/a Maplewood Manor Retirement Home (Respondent) (*Dismissed*)

2487-90-R: Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 880 (Applicant) v. Canadian Welding & Manufacturing Company Ltd. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

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